Supreme Court, U.S.
FILED

94 939 NOV 2 1 1994

OFFICE OF THE CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

ENTERPRISE VI, et al., Petitioners,

versus

BRUCE FERGUSON, et al., Respondents.

and

ERPENBECK COMMERCIAL ENTERPRISES, INC., et al., Petitioner,

versus

BRUCE FERGUSON, et al., Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF KENTUCKY

PETITION FOR A WRIT OF CERTIORARI

PAUL J. VESPER
Counsel of Record
VESPER & ALGIE
1522 DIXIE HIGHWAY,
SUITE 250
COVINGTON, KENTUCKY 41011
(606) 491-4222

ALEX F. TALBOTT
101 S. FIFTH STREET,
SUITE 2100
LOUISVILLE, KENTUCKY 40202
(502) 582-1891
Counsel for Petitioners

NOVEMBER 1994

QUESTIONS PRESENTED

I. Whether local zoners and planners are entitled to absolute immunity, when sued in their individual capacities, from answering in 42 U.S.C. §1983 damages.

II. Whether the activity of zoners and planners who interpret and enforce a zoning ordinance is functionally judicial or administrative for purposes of immunity under 42 U.S.C. §1983.

III. Whether a trial court must make findings as to the function of the planner or zoner when confronted with a 42 U.S.C. §1983 violation.

LIST OF PARTIES

Enterprise VI, a Kentucky General Partnership consisting of Albert J. Vesper III (also acting as Guardian of the Estate of Alicia Vesper), Ronald J. Vesper, Paul J. Vesper, Stephen J. Vesper, and Dennis J. Vesper ("Enterprise VI") and Erpenbeck Commercial Enterprises, Inc. ("Erpenbeck") are the Petitioners.

The members of the Boone County Fiscal Court (to wit: Bruce Ferguson, Don Davis, Irene Patrick and Shirley Meihaus) and the members of the Boone County Planning Commission (to wit: Larry Barnett, Fred Burch, Lawrence Collins, R.N. Greene, Rector Jones, Robert Kirby, Donald McMillan, Barry Nelter, Thurman Owens, Ralph Rush, Floyd Sharp, Carol Smith and William Viox), respectively and in their individual capacities, are the Respondents.

On the questions presented, the aforementioned parties and the parties to the proceedings below are identical.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES..... v

OPINIONS BELOW..... 1

JURISDICTION..... 2

CONSTITUTIONAL PROVISIONS INVOLVED..... 2

STATUTORY PROVISION INVOLVED..... 3

STATEMENT..... 4

REASONS FOR GRANTING THE PETITION..... 7

I. Local zoners and planners are not entitled to absolute immunity, when sued in their individual capacities, from answering in 42 U.S.C. §1983 damages..... 8

II. When zoners and planners interpret and enforce a zoning ordinance to a specific parcel of land, their activity is functionally administrative for purposes of immunity under 42 U.S.C. §1983..... 14

Page

III. When confronted with a potential 42 U.S.C. §1983 violation by an individual zoner or planner, a trial court must engage in a fact-based inquiry to determine the function of such individual in performing a given act prior to according immunity..... 18

CONCLUSION..... 19

APPENDIX---

Kentucky Supreme Court Order Denying Discretionary Review..... 1a

Kentucky Court of Appeals Order Denying Petition for Rehearing and Substituting Revised Opinion for Original..... 2a

Boone Circuit Court Order Dismissing Individual Members of the Boone County Planning Commission and Boone County Fiscal Court..... 13a

Enterprise VI's Notice of Appeal and Amended Complaint..... 19a

TABLE OF AUTHORITIES

Cases: Page

Antoine v. Byers and Anderson, Inc.,
508 U.S. ___ (1993) 15

Burns v. Reed,
500 U.S. 478 (1991) 9

Crymes v. Dekalb County,
923 F.2d 1482 (11th Cir. 1991) . 17

Cutting v. Muzzey,
724 F.2d 259 (1st Cir. 1984) . . 17

Edwards v. United States,
286 U.S. 482 (1932) 12

Ewell vs. Central City,
340 S.W.2d 479 (Ky. 1960) 7

Forrester v. White,
484 U.S. 219 (1988) . . . 10,11,12

Hafer v. Melo,
112 U.S. 358 (1991) 8-9

Harlow v. Fitzgerald,
457 U.S. 800 (1982) 11

Hoffman v. Harris,
7 F.3d 233, cert. denied,
114 S.Ct. 1631 12,14

Imbler vs. Pachtman,
424 U.S. 409 (1976) 9

La Abra Silver Mining v. United States,
175 U.S. 423 (1899) 12

Marrero v. City of Hialeah,
625 F.2d 499 (5th Cir. 1980),
cert. denied, 450 U.S. 913 (1981) 16

Pierson v. Ray,
386 U.S. 547 (1967) 10

Pulliam v. Tower,
466 U.S. 522 12

San Diego Gas & Electric v. City,
450 U.S. 621 (1981) 7

Scott v. Greenville County,
724 F.2d 1409 (4th Cir. 1983) . 18

Smith vs. Isaacs,
777 S.W.2d 912, 915 (Ky. 1989) . . 8

Tower v. Glover,
467 U.S. 914 12

Constitutional and Statutory Provisions:

FIFTH and FOURTEENTH AMENDMENTS . passim

42 U.S.C. §1983 . . . . . passim

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

ENTERPRISE VI, et al., Petitioners,

versus

BRUCE FERGUSON, et al., Respondents.

and

ERPENBECK COMMERCIAL ENTERPRISES, INC., et al., Petitioner,

versus

BRUCE FERGUSON, et al., Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Kentucky

---

Petitioners respectfully petition this Court for a writ of certiorari to review the judgment of the Supreme Court of Kentucky in this case.

OPINIONS BELOW

The Order of the Supreme Court of Kentucky denying discretionary review (App., *infra*, 1a) is unreported. The Order of the Kentucky Court of Appeals denying petition for rehearing and substituting revised opinion (App., *infra*, 2a-12a) is unreported. The Order of the Boone Circuit Court dismissing the individual members of the Boone County Planning Commission and Fiscal Court (App., *infra*, 13a-17a) is unreported.

JURISDICTION

The Supreme Court of Kentucky entered its judgment on August 24, 1994 (App., *infra*, 1a). This Petition is filed within 90 days after the entry of said judgment. Therefore, the jurisdiction of this Court is invoked under 28 U.S.C. §1257.

CONSTITUTIONAL PROVISIONS INVOLVED

FIFTH AMENDMENT

"No person shall be...deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

FOURTEENTH AMENDMENT

Section 1. "...nor shall any State deprive any person of life, liberty, or property, without due process of law..."

STATUTORY PROVISIONS INVOLVED

42 U.S.C. §1983 provides:

> "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the constitution and laws shall be liable to the party injured and in action at law, suit in equity, or other proper proceeding for redress."

STATEMENT

Petitioner Enterprise VI was and is the owner of a 264 acre tract of undeveloped property ("tract") in Boone County, Kentucky. (App., *infra*, 23a). A portion of the tract was zoned by a Boone County Zoning Ordinance for commercial retail uses. (App., *infra*, 25a-26a). Enterprise VI contracted to sell the tract to Petitioner Erpenbeck, a developer, for use as a retail shopping center. (App., *infra*, 25a, 29a-30a, 39a). The proposed use for the tract was consistent with the existing underlying zoning. (App., *infra*, 30a-31a).

The Boone County Fiscal Court is the chief body with legislative power in the county where the zoned tract is located (App, *infra*, 23a). The individual members of the Boone County Planning and Zoning Commission and the Fiscal Court, due to their interpretation and enforcement of a local zoning ordinance, permitted no use for the tract. (App., *infra*, 29a, 31a-34a). Such action taken by the individual Respondents amounted to a regulatory taking (App., *infra*, 40a-41a) resulting in substantial loss and damage to Petitioners (App., *infra*, 41a).

Respondents' denial of any use for the subject tract owned by Petitioners was deliberate (App., *infra*, 40a, 42a)

and resulted in deprivation of federally protected rights under the Fifth and Fourteenth Amendments to the United States Constitution (App., *infra*, 40a-41a) and thereby is actionable under the Civil Rights Act of 1871; 42 U.S.C. §1983 ("§1983"). Further, the acts of the Respondents were unconstitutional and were known or should have been known to be unconstitutional. (App, *infra*, 42a).

Petitioner originally brought this action alleging violations by the Boone County Fiscal Court, its agents and employees, of Petitioner's rights under both the United States Constitution and the Constitution of the Commonwealth of Kentucky. (App., *infra*, 18a-22a). The complaint was timely amended to clearly state a cause of action as to the Fiscal Court and Planning Commission members, in their individual capacities, under §1983 for damages. (App, *infra*, 18a-44a).

The Boone Circuit Court ("trial court") dismissed Petitioners' claims against the individual members of the Boone County Planning Commission and Fiscal Court under Kentucky Civil Rule 12.02 and granted them absolute judicial immunity as a bar defense to all §1983 claims. (App., *infra*, 13a). The Boone County Fiscal Court is a political subdivision of the Commonwealth of

Kentucky. (App., *infra*, 23a). The Planning and Zoning Commission is an administrative body. (App., *infra*, 23a). Regarding the individual members of the Boone County Fiscal Court, the trial court determined that "[s]ince the individual members of the Fiscal Court were acting in their official capacities, their exercise of discretion . . . was judicial or quasi-judicial in nature, and they are entitled to absolute immunity in their individual capacities." (App., *infra*, 15a-16a (Emphasis added)). The trial court based its order solely on the pleadings without benefit of proof (affidavits) or an evidentiary hearing to determine the function or role employed and based exclusively on the administrative body's actions as being "official" in character.

After motions to vacate were filed, the trial court entered a final order (App., *infra*, 17a) from which appeal has been taken. The Kentucky Court of Appeals affirmed the decision of the trial court without a rehearing. (App., *infra*, 2a). The Supreme Court of Kentucky subsequently denied discretionary review. (App., *infra*, 1a).

REASONS FOR GRANTING THE PETITION

The state court's grant of absolute immunity in this case from §1983 damages closes the courthouse to federal claims. To grant absolute immunity to local zoners and planners, who enforce an unconstitutional ordinance, denies landowners the right to seek redress under federal law and removes a powerful tool to control zoning abuse.

> "[A]fter all, a policeman must know the Constitution, then why not a planner?"[1]

This Court has never before decided whether the immunity accorded to local zoning and planning officials is an absolute or qualified one. The Court now has the ideal opportunity to decide the legal issues presented in this case since they come to the Court in the most unobfuscated format possible.[2]

---

[1] See Justice Brennen's dissent in San Diego Gas & Electric Co. v. City of San Diego, 450 U.S. 621 (1981).

[2] When considering a motion to dismiss under Ky. C.R. 12.02, a court must accept as true the factual allegations of the complaint and must determine only whether those allegations sufficiently comprise the basis of a legal claim. Ewell vs. Central City, 340 S.W.2d 479 (Ky. 1960). "...[T]he Court should not dismiss unless it appears [that] the Plaintiff would not be

I. Local zoners and planners are not entitled to absolute immunity, when sued in their individual capacities, from answering in 42 U.S.C. §1983 damages.

In Hafer v. Melo, 112 U.S. 358 (1991), the Court observed that it had refused to extend absolute immunity beyond a "very limited class of officials, including the President of the United States, legislators carrying out their legislative functions and judges carrying out their judicial functions, where special functions or constitutional status requires complete protection from suit. State executive officials are not entitled to absolute immunity for their official actions." Id.[3] A finding of immunity from suit under §1983 is "predicated upon a considered inquiry into the immunity historically accorded

---

entitled to relief under any state of facts which could be proved in support of its claim" Id. at 480. As succinctly stated in Smith vs. Isaacs, 777 S.W.2d 912, 915 (Ky. 1989), "...a Motion to Dismiss is directed at the substance of the pleading." Accordingly, this Court should consider all factual assertions made by Petitioner in its amended complaint as true.

[3] Hafer, which addressed the question of immunity defenses available to officials sued in their individual capacities, was decided on November 5, 1991, after the trial court's original order of dismissal.

the relevant official at common law and the interest behind it, Imbler vs. Pachtman, 424 U.S. 409, 421 (1976), and officials seeking absolute immunity must show that such immunity is justified for the governmental function at issue. Burns vs. Reed, 500 U.S. [478] (1991)" Hafer vs. Melo, supra.

The inquiry required by the Hafer decision is best illustrated by the two pronged analysis adopted by this Court as to absolute judicial immunity in Burns vs. Reed, when it dealt with granting immunity to a prosecutor for giving legal advice to the police issuing a search warrant. The test provides that: 1) American common law is determinative (and the office of public prosecutor was firmly rooted in American common law), and 2) the Court should look to the common law and other history for guidance because the role of the Court is not to make a free-wheeling public choice, but rather to discern Congress' likely intent in enacting §1983. Burns v. Reed, supra[4]. Accordingly, the Court should

---

[4] In a concurring opinion to Burns, Justice Scalia summarized that "where we have found that a tradition of absolute immunity did not exist as of 1871, we have refused to grant such immunity under §1983".

not establish immunities from §1983 actions in the interest of what it judges to be sound public policy since the statute, on its face, does not provide for immunities. To read absolute immunity into §1983, for conduct that was only accorded qualified immunity in 1871, would be going too far.

When a government official performs functions historically either legislative or judicial acts, he or she is entitled to absolute immunity with regard to actions taken in such capacity. See Pierson v. Ray, 386 U.S. 547, 553-54 (1967). By contrast, when a government official performs an executive or administrative function, he or she is not entitled to absolute immunity. Forrester v. White, 484 U.S. 219 (1988)(holding state judge's demotion and discharge of court employee is administrative decision that is not entitled to absolute immunity.)[5]

---

[5] The obvious basis for the distinction is that to not afford immunity for legislative and judicial acts would have a chilling and detrimental effect on the free operation of government, while, on the other hand, to grant absolute immunity for discretionary acts would deny compensation to private citizens who are bound to rely upon public servants and suffer loss when they fail to dutifully perform their office.

A governmental official performing an executive or administrative function is merely entitled to qualified immunity, and only then if his or her "conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).[6] Unlike absolute immunity, one who asserts a qualified immunity may nevertheless be found by a trier of fact to be liable under §1983.[7]

The "functional" approach focuses on the nature of the duties with which a particular government official "has been lawfully entrusted, [and evaluates] the effect that exposure to particular forms of liability would likely have on the appropriate exercise of those functions." Forrester, 484 U.S. at 228. The government official seeking immunity, therefore, has the burden of showing that an exemption from personal liability is justified "by overriding considerations

---

[6] A question of fact exists in this case to determine whether it is objectively reasonable for a government official to believe that he or she is acting within constitutional and statutory bounds so as to insulate him or her from §1983 liability stemming from his or her conduct.

[7] The courts below reasoned that since zoning duties were integrally related to the judicial process, the individual zoners should be dismissed.

of public policy," id., or by a tradition of common law practice existing at the time of the enactment of §1983. Pulliam v. Allen, 466 U.S. at 529; Tower v. Glover, 467 U.S. at 920; accord Hoffman v. Harris, 7 F.3d 233, cert. denied, 114 S.Ct. 1631.

As set forth in the dissenting opinion in another §1983 absolute immunity case in this Court's last term from Kentucky, Hoffman, supra, issued by Justice Thomas, with whom Justice Scalia joined, this Court should look to the function an individual performs rather than his location within a particular branch of government. Id. For example, when the Vice President of the United States votes in the Senate to break a tie, U.S. Const. Art. I §III Cl. 4, he acts legislatively, not executively. Similarly, the president acts legislatively when he approves or vetoes bills passed by Congress. See, e.g., La Abra Silver Mining Co. v. United States, 175 U.S. 423, 453 (1899); Edwards v. United States, 286 U.S. 482, 490 (1932). When a judge makes personnel decisions concerning his court, he acts administratively, not judicially. Forrester, 484 U.S. at 228.

The trial court, in this case, based its ruling on the actions of the Respondents as occurring in their "official capacity". (App. 15a-16a). The acts complained of by Petitioners dealt with the interpretation and enforcement of a zoning ordinance, an administrative function (App., *infra*, 23a). The trial court chose to ignore the functional approach to immunity analysis.

While line drawing may be difficult, the functional approach would preserve the balance between inhibiting public officials from exercising their essential duties and protecting victims of wrongs committed by public officials. If this Court chooses not to grant the relief requested here, Kentucky landowners will no longer have §1983 available in Kentucky courts as a remedy against local zoners and planners who unlawfully deprive them of their use of land. Such a result will surely overburden federal courts with §1983 actions as the only avenue available for landowners against constitution-offending conduct by local zoners and planners.[8]

---

[8] Denial of this Petition jeopardizes Kentucky state court enforcement of federal actions under §1983. The Kentucky Supreme Court is slowly eroding federal claims as evident by its grant of absolute immunity to social workers,

Consequently, the writ sought should be granted to clearly distinguish whether absolute or qualified immunity prevails for local zoners and planners when unlawfully enforcing unconstitutional ordinances. In addition, the entire matter should be vacated and remanded so that the trial court may examine the injurious conduct of Respondents and determine the function they performed when interpreting and enforcing the unconstitutional statute. The degree of immunity from their activity will depend on the results of such determination. The question on review, therefore, for the Court becomes whether such action occurred in the performance of a judicial function or an executory one.

By interpreting and enforcing an unconstitutional zoning ordinance, the Respondents were clearly acting in an executory as opposed to "judicial or quasi-judicial" capacity as determined by the trial court. Consequently, Respondents are not entitled to the absolute immunity granted them. The just result in this case is for the Court to expressly make such distinction to clear

---

the subject of the Hoffman, supra, petition denied by this Court it its last term.

up the confusion which exists, and vacate and remand the matter to the trial court for further proceedings.

II. When zoners and planners interpret and enforce a zoning ordinance to a specific parcel of land, their activity is functionally administrative for purposes of immunity under 42 U.S.C. §1983.

This all assumes, of course, that zoners and planners even existed in 1871. If that assumption is false, the argument for granting absolute immunity becomes "at least" more difficult to maintain.[9]

Historically, the role of planning and zoning was unheard of when the Civil Rights Act of 1871 was enacted. Indeed, the trial court observed that no Kentucky case could be found addressing the immunity issue. The activities of most local officials cannot be characterized as purely administrative, legislative, or judicial. Instead, the scope of immunity depends on the *nature* of the activity involved. As the Fifth Circuit has

---

[9] C.f. Antoine vs. Byers and Anderson, Inc. 508 U.S. ___ (1993)(denying court reporter absolute immunity in large part because official court reporters did not begin appearing in state courts until the late 19th century).

recognized, "it is the official function that determines the degree of immunity required, not the status of the acting officer." Marrero v. City of Hialeah, 625 F.2d 499, 508 (5th Cir. 1980), cert. denied, 450 U.S. 913 (1981). Thus, only when local officials act in a purely judicial or legislative capacity, are they entitled to absolute immunity. If their conduct is administrative in nature, then qualified immunity is enough.

The Petitioner in this case sought merely to use their property consistent with underlying zoning (App. 30a-32a). The Respondents are alleged to have enforced their ordinance as to the Petitioner in violation of their own zoning ordinance and of state and federal constitutional provisions and in a manner which was tract specific (App., *infra*, 33a). The Petitioner, to use their property at all, would have been required to resort to an arbitrary and discretionary legislative process required by the Respondents.

The actions of the zoners and planners complained of here dealt with the issuance to Petitioners of a zoning permit which was denied through an interpretation and enforcement of Respondent's zoning ordinance which would

have rendered that ordinance and its enforcement unconstitutional. Petitioners were allowed no use for its property until special legislative permission would have been granted (App., *infra*, 29a). The decision to deny the permit was administrative and was site specific.[10]

Although zoning and planning often involves legislative activity, it should not always be legislative or judicial for purposes of immunity. Accord Cutting v. Muzzey, 724 F.2d 259 (1st Cir. 1984)(holding members of a municipal planning board were not entitled to absolute immunity when imposing conditions on a developer because of racial animus) and Crymes v. DeKalb County, 923 F.2d 1482, 1486 (11th Cir. 1991)(holding that a land use decision by local zoners and planners which amounts to an "application of policy to a specific party" is not protected by immunity). If the underlying purpose of zoning activity is to establish general policy, then it is legislative. However, if the action "single[s] out specifiable individuals and affect[s] them

---

[10] Respondents would argue that Petitioner could have gone through the legislative process to enhance the zoning use. In other words, Petitioners were required to get a new ordinance enacted to use their property.

differently from others," it is administrative. Cutting, 724 F.2d at 261; see Scott v. Greenville County, 724 F.2d 1409, 1423 (4th Cir. 1983)(holding that "when local zoning officials do more than adopt prospective, legislative-type rules and take the next step into the area of enforcement, they can claim only the executive qualified immunity appropriate to that activity.")

The trial court chose to ignore the function the Respondents were fulfilling in enforcing its own zoning ordinance. The trial court was able to do this by adopting "official immunity" as Kentucky's solution to federal claims redress.

III. When confronted with a potential 42 U.S.C. §1983 violation by an individual zoner or planner, a trial court must engage in a fact-based inquiry to determine the function of such individual in performing a given act prior to according immunity.

The trial court's failure to permit an evidentiary hearing or offer of proof before determining the function performed by the individual Respondents does not preclude this Court from properly reviewing the trial court's order for

error.[11] However, when confronted with a 42 U.S.C. §1983 violation, a trial court must be required to make findings pertaining to the function of the planner or zoner prior to ascertaining the level of immunity.

The blind grant of absolute immunity in this case ignores the possibility that Respondents could have been functioning in an executory or administrative capacity whereby they would merely be entitled to qualified immunity. Therefore, before a trial court may strip away constitutionally protected rights from Petitioners, it should be required to make appropriate findings under federal immunities rulings.

CONCLUSION

By granting the writ sought here, this Court can adjudicate for the first time whether local zoners and planners, acting in their individual capacities, are entitled to absolute immunity when enforcing unconstitutional ordinances.

The courts of Kentucky have decided that individual zoners and planners are essentially permitted to operate above

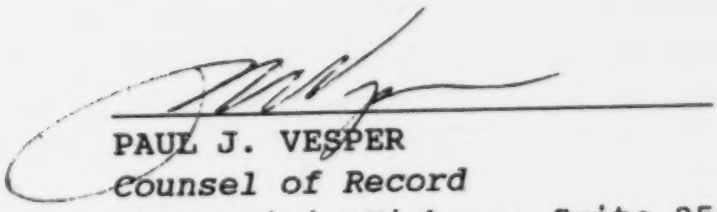
---

[11] See Footnote 2.

the law. Accordingly, whether, or under what circumstances, they can be made to answer for constitution-offending conduct must be decided by this Court. For all of the above-stated reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

VESPER & ALGIE



PAUL J. VESPER
Counsel of Record
1522 Dixie Highway, Suite 250
Covington, Kentucky 41011
(606) 491-4222

Of Counsel:

ALEX F. TALBOTT
101 S. Fifth Street, Suite 2100
Louisville, Kentucky 40202
(502) 582-1891
Counsel for Petitioners

SUPREME COURT OF KENTUCKY
93-SC-1012-D
(92-CA-216)

ENTERPRISE VI, A KENTUCKY
GENERAL PARTNERSHIP, ET AL. MOVANTS

vs. BOONE CIRCUIT COURT
NO. 90-CI-174

BRUCE FERGUSON, ET AL. RESPONDENTS

AND 93-SC-1019-D
(92-CA-213)

ERPENBECK COMMERCIAL
ENTERPRISES, INC. MOVANT

vs. BOONE CIRCUIT COURT
NO. 90-CI-174

BRUCE FERGUSON, ET AL. RESPONDENTS

ORDER DENYING DISCRETIONARY REVIEW

The motions for review of the decision of the Court of Appeals are denied.

The motions to strike the responses in each case are denied.

Stumbo, J., not sitting.

ENTERED August 24, 1994.

/s/ Robert F. Stephens
Chief Justice

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
92-CA-000213-MR

ERPENBECK COMMERCIAL
ENTERPRISES, INC. APPELLANT

APPEAL FROM BOONE CIRCUIT COURT
vs. HONORABLE SAM NEACE, JUDGE
ACTION NO. 90-CI-174

BRUCE FERGUSON; DON DAVIS;
IRENE PATRICK; SHIRLEY MEIHAUS;
LARRY BARNETT; FRED BURCH;
LAWRENCE COLLINS; R. N. GREENE;
RECTOR JONES; ROBERT KIRBY;
DONALD McMILLAN; BARRY NELTNER;
THURMAN OWENS; RALPH RUSH;
FLOYD SHARP; CAROL SMITH; and
WILLIAM VIOX APPELLEES

and 92-CA-000216-MR

ENTERPRISE VI, A Kentucky General
Partnership; ALBERT J. VESPER III;
RONALD J. VESPER; PAUL J. VESPER;
STEPHEN J. VESPER; DENNIS J.
VESPER; and ALBERT J. VESPER III,
Guardian of ALICIA VESPER Estate
APPELLANTS

APPEAL FROM BOONE CIRCUIT COURT
vs. HONORABLE SAM NEACE, JUDGE
ACTION NO. 90-CI-174

BRUCE FERGUSON; DON DAVIS;
IRENE PATRICK; SHIRLEY MEIHAUS;
LARRY BARNETT; DONALD McMILLAN;
BARRY NELTNER; THURMAN OWENS;
RALPH RUSH; FLOYD SHARP;
CAROL SMITH; and WILLIAM VIOX APPELLEES

ORDER DENYING PETITION FOR REHEARING
AND SUBSTITUTING REVISED OPINION
FOR ORIGINAL OPINION

BEFORE: GUDGEL, HUDDLESTON, and STUMBO[1], Judges.

It is hereby ORDERED that the petitions for rehearing filed by Enterprise VI and Albert J. Vesper, III, Guardian, and by Erpenbeck Commercial Enterprises, Inc., are DENIED.

It is further ORDERED that the attached revised opinion is substituted for the opinion originally rendered in this case.

ALL CONCUR.

ENTERED: December 3, 1993

/s/ Joseph R. Huddleston
JUDGE, COURT OF APPEALS

---

[1] Judge Stumbo concurred in this order prior to leaving this Court to accept election to the Kentucky Supreme Court.

RENDERED: March 12, 1993; 10:00 a.m.
NOT TO BE PUBLISHED
WITHDRAWN AND REISSUED: December 3, 1993;
2:00 p.m.

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS
NO. 92-CA-000213-MR

ERPENBECK COMMERCIAL
ENTERPRISES, INC. APPELLANT

APPEAL FROM BOONE CIRCUIT COURT
vs. HONORABLE SAM NEACE, JUDGE
ACTION NO. 90-CI-174

BRUCE FERGUSON; DON DAVIS; IRENE PATRICK; SHIRLEY MEIHAUS; LARRY BARNETT; FRED BURCH; LAWRENCE COLLINS; R. N. GREENE; RECTOR JONES; ROBERT KIRBY; DONALD McMILLAN; BARRY NELTNER; THURMAN OWENS; RALPH RUSH; FLOYD SHARP; CAROL SMITH; and WILLIAM VIOX APPELLEES

and 92-CA-000216-MR

ENTERPRISE VI, A Kentucky General Partnership; ALBERT J. VESPER III; RONALD J. VESPER; PAUL J. VESPER; STEPHEN J. VESPER; DENNIS J. VESPER; and ALBERT J. VESPER III, Guardian of ALICIA VESPER Estate
APPELLANTS

APPEAL FROM BOONE CIRCUIT COURT
vs. HONORABLE SAM NEACE, JUDGE
ACTION NO. 90-CI-174

BRUCE FERGUSON; DON DAVIS; IRENE PATRICK; SHIRLEY MEIHAUS; LARRY BARNETT; DONALD McMILLAN; BARRY NELTNER; THURMAN OWENS; RALPH RUSH; FLOYD SHARP; CAROL SMITH; and WILLIAM VIOX APPELLEES

AFFIRMING

* * * * * * * * * * *

BEFORE: GUDGEL, HUDDLESTON, and STUMBO[1], Judges.

STUMBO, JUDGE: The single issue presented by these appeals is one of first impression under Kentucky law: Are the members of county fiscal courts entitled to absolute immunity in their individual capacities for alleged tortious activity and 42 U.S.C. 1983 violations caused by decisions made in their official capacities in regard to a concept development plan review? After reviewing the record and the applicable, law, we answer this question in the affirmative.

---

[1] Judge Stumbo concurred in this order prior to leaving this Court to accept election to the Kentucky Supreme Court.

By way of factual background, both Enterprise VI, the owner of certain real estate in Boone County, and Erpenbeck Commercial Enterprises, Inc. (hereinafter "Erpenbeck"), which intended to purchase this real estate from Enterprise VI in order to develop it commercially, sought a concept development plan review from the Boone County Planning Commission. In this context, such review is analogous to a request for a conditional use permit, although it also has elements of a traditional map amendment since the Commission only recommends to the Boone County Fiscal Court. See KRS 100.211; and KRS 100.237. Enterprise VI and Erpenbeck sought approval of the use of a 43.45 acre piece of land for a Bigg's hypermarket. Of the 43.45 acres, 34.8 lay in a C-2/PD overlay zone with the remainder being zoned I-1. Thus, the use Appellants sought required both approval of the PD, or planned development aspect of the commercially zoned portion of the land, and apparently a zoning change of the industrially zoned portion of the land, although no request to (sic) for a map amendment was filed. After the planning commission denied the request, the Boone County Fiscal Court failed to override its recommendation, which made the recommendation final under the statute. Both Erpenbeck and Enterprise VI, along with Albert J. Vesper III, as guardian of Alicia Vesper, filed actions

in the Boone Circuit Court and, in their amended complaints, sought various relief form the fiscal court and the planning commission and, in the alternative to those causes of action, sought to pursue the members of these bodies in their individual capacities based upon four separate theories of liability. After ordering the consolidation of the two actions, the court granted two separate motions from the individual members of the fiscal court and the planning commission to dismiss the alternative arguments made in the amended complaints under CR 12.02 for failure to state a cause of action. Also, it made this decision final and appealable under CR 54.02. On December 19, 1991, the court overruled Enterprise VI's motion to vacate the final judgment of October 28, 1991. Both Erpenbeck and Enterprise VI filed appeals from this judgment, which have been combined for the purposes of this opinion.

Initially, we note that both appellants failed to pursue their theory of liability regarding a taking of property without just compensation under the Fifth Amendment of the United States Constitution against the individual defendants. Instead, the appellants now assert that the appellees should be liable in tort for violations of KRS 446.070, for tortious interference with contractual violations, and that federal

liability under 42 U.S.C. 1983 is applicable. In dismissing the claims against the fiscal court, the trial court held that, although there were no Kentucky cases directly on point, the reasoning of the court in Jodeco, Inc. vs. Hann, 674 F.Supp.488 (D.N.J. 1987) was applicable. In that case, the court held that a city zoning board was entitled to absolute quasi-judicial immunity under state law because the functions of that body in deciding upon a zoning amendment request were essentially adjudicatory. In making this determination, the court relied upon Butz v. Economou, 438 U.S. 478, 511-517. 98 S.Ct. 2894, 2913-16, 57 L.Ed.2d 895 (1978), which extended absolute judicial immunity to executive branch administrative law judges based on the nature of the government function being performed.

While there are no Kentucky cases directly on point, Hacker v. Baesler, Ky., 812 S.W.2d 706,709 (1991), removes any doubt that the actions of the fiscal court in this case, which involves review of a proposed concept development plan, and apparently an attempt to reclassify a particular property, is "the culmination of a process essentially adjudicatory." We interpret these words to mean that the fiscal court in this case acted in a quasi-judicial manner. In Bolden v. City of Covington, Ky., 803 S.W.2d 577 (1991),

the Supreme Court extended absolute immunity to the City of Covington based upon the quasi-judicial nature of the duties of the City Director of Housing Development, holding that there was no more liability for the city because of any incompetent performance of the director's duties "than there would be where a judge fails to make a decision or makes a wrong one." Bolden, supra, at 581. Thus, it is clear that the individual members of the fiscal court are entitled to absolute immunity based upon the quasi-judicial nature of their duties in this case. Moreover, since the individual fiscal court members enjoy absolute immunity under state law, we find that they are also entitled to absolute immunity under 42 U.S.C. 1983. See Jodeco, supra. at 497, citing Qualls v. Parrish, 534 F.2d 690, 694 (6th Cir. 1976).

In dismissing the appellants' claims against the individual members of the planning commission, the trial court did not reach the questions of whether absolute immunity should be given for the actions of the planning commission in recommending for or against the concept development plan. Instead, the court held that any action of the planning commission was only a recommendation and was not a final action subject to appeal under KRS 100.347(2). However, this statute plainly allows a party thirty

days to appeal a final action of the planning commission to the circuit court of the county in which the property lies, even though, as a variance type action controlled by KRS 100.201(5), such appeal must be taken within thirty days of the final action of the fiscal court. Moreover, the statute requires that the planning commission be made a party in the appeal to the circuit court. Thus, while the end result of the planning commission's work in this manner is only recommendation, KRS 100.347(2) specifically makes such action appealable to the circuit court as a final action.

In light of KRS 100.347(2), we must decide whether the actions of the planning commission are also entitled to absolute quasi-judicial immunity. Initially, we note that, in making a recommendation to the fiscal court in this type of case, the planning commission engages in the same sort of fact-finding in regard to a specific piece of property that the Supreme Court classified as quasi-judicial in Hacker, supra, at 709-710. Since the fiscal court must rely upon the recommendations of the planning commission in making its final decision, we feel that the integrity of this process, which is essentially adjudicative in nature, requires that absolute immunity under state law must be accorded to members of the Planning Commission in making their

recommendation. As made clear by Burns v. Reed, 500 U.S. ____, 111 S.Ct. 1934, 114 L.Ed.2d 547 (1991), immunity under 42 U.S.C. 1983 is dependent upon the governmental function at issue in the case. While the presumption is that qualified immunity is sufficient to protect the actions of the official, we feel that absolute immunity under federal law is necessary to protect the integrity of the quasi-judicial process at issue in this case.

Therefore, the judgment of the Boone Circuit Court is affirmed.

ALL CONCUR.

ATTORNEY FOR APPELLANT,
ERPENBECK COMMERCIAL ENTERPRISES, INC.:

Alex F. Talbott
Thomas Nienaber
Louisville, KY

ATTORNEY FOR APPELLEES:

David A. Schneider
Joseph L. Baker
ZIEGLER & SCHNEIDER, P.S.C.
Covington, KY

ATTORNEY FOR APPELLANT, ENTERPRISE VI; ALBERT J. VESPER III, Guardian for Alicia Vesper:

Paul J. Vesper
VESPER & ALGIE
Covington, KY

COMMONWEALTH OF KENTUCKY
BOONE CIRCUIT COURT
CONSOLIDATED CIVIL ACTIONS
CASE NOS. 90-CI-174 AND 90-CI-175

ENTERPRISE VI, ET AL. PLAINTIFFS

vs:
BOONE COUNTY FISCAL COURT,
ET AL. DEFENDANTS

and

ERPENBECK COMMERCIAL
ENTERPRISES, ET. AL. PLAINTIFFS

vs:

BOONE COUNTY FISCAL COURT,
ET AL. DEFENDANTS

ORDER DISMISSING INDIVIDUAL
MEMBERS OF THE BOONE COUNTY PLANNING
COMMISSION AND BOONE COUNTY FISCAL COURT

* * * * * * * * * * *

The individual members of the Boone County Fiscal Court and the individual members of the Boone County Planning Commission have filed separate Motions to Dismiss for failure to state a cause of action under Civil Rule 12.02.

Having reviewed the Complaints in the light most favorable to the Plaintiffs and having read the legal memoranda submitted by counsel for the parties, it is hereby ORDERED and ADJUDGED that the Motions of the individual Defendants are sustained and the individual members of the Planning Commission and individual members of the Fiscal Court are hereby dismissed as Defendants in the lawsuit.

KRS 100.347(2) provides for appeal from final action of the Planning Commission to the Circuit Court. However, that section further provides: "Such action shall not include the commission's recommendations made to other governmental bodies". The Amended Complaint is based on the January 3, 1990, recommendation of the Planning Commission to the Fiscal Court. That advisory recommendation was not a final action and is not the proper subject of an appeal. Further, the advisory recommendation was the result of a vote taken by the Planning Commission at its official meeting. The Planning Commission can only act through motions and votes of its members. The end result is the action of the Planning Commission and not the action of the individual members. Therefore, the individual members of the Planning Commission should be dismissed as Defendants.

As relates to the individual members of the Boone County Fiscal Court, the Complaint makes no reference to individual acts of these Fiscal Court members, other than their vote on the Plaintiff's application. That vote on February 6, 1990 accepted the recommendation of the Planning Commission and was exercised in their capacity as officers of the Fiscal Court. Said recommendation contained Findings of Facts relating to the Concept Development Plan, the Boone County Comprehensive Plan, land use compatibility, effect on the environment, and traffic, all based on evidence from numerous witnesses at the due process-type public hearing on December 6, 1989. The Fiscal Court could have accepted, rejected or modified the recommendation of the Planning Commission, following the procedure outlined in City of Louisville v. McDonald, Ky., 470 S.W.2d 173 (1971). The Fiscal Court, in accepting the recommendation, exercised discretion on the culmination of a process essentially adjudicatory in nature. See, Hacker v. Baesler, Ky. 812 S.W.2d 706 (1991). Since the individual members of the Fiscal Court were acting in their official capacity, their exercise of discretion in accepting the recommendation was judicial or quasi-judicial in nature, and they are entitled to absolute immunity in their individual

capacities. While no Kentucky cases specifically in (SIC) point on the individual liability of planning and zoning officials were found, the Court adopts the reasoning of the Federal District Court in Jodeco, Inc. vs. Hahn, N.J., 674 F.Supp. 488 to the effect that the zoning duties involved were so "integrally related to the judicial process as to warrant shielding from liability those individuals acting in performance of them." Therefore, the individual members of the Fiscal Court are properly dismissed as Defendants.

This is a final judgment pursuant to Civil Rule 54.02 and there is no just reason for delay.

/s/ Sam Neace
Judge

cc: Dale T. Wilson
Paul Vesper
Thomas R. Nienaber
David A. Schneider
Larry Crigler
Alex Talbott

Notice

All parties will take notice that this order was entered in the Office of The Boone Circuit Court Clerk on the 28th day of October, 1991.

PAT GUTZEIT, BOONE CIRCUIT COURT
/s/ DP D.C.

BOONE CIRCUIT COURT
CASE NO. 90-CI-174 AND 90-CI-175

ENTERPRISE VI, ET AL. PLAINTIFFS

VS. ORDER

BOONE COUNTY FISCAL COURT, ET AL. DEFENDANTS

Plaintiffs, Enterprise VI, et al., having moved the court to vacate this Court's Judgment entered October 28, 1991, and the court being sufficiently advised,

IT IS ORDERED that plaintiff's motion is OVERRULED.

/s/ Sam Neace
JUDGE, BOONE CIRCUIT COURT

COPIES TO:

PAUL J. VESPER, ESQ.
LARRY CRIGLER, ESQ.
DAVID A. SCHNEIDER, ESQ.
THOMAS R. NIENABER, ESQ.
ALEX TALBOTT, ESQ.

NOTICE

All parties will take notice that this order was entered in the Office of the Boone Circuit Court Clerk on the 19th day of December, 1991.
PAT GUTZEIT, BOONE CIRCUIT COURT
/s/ KM D.C.

FILED
JULY 5, 1991
PAT GUTZEIT
CLERK BOONE CIRCUIT COURT

COURT OF JUSTICE
BOONE CIRCUIT COURT
BOONE COUNTY, KENTUCKY
CASE NO. 90-CI-174

ENTERPRISE VI, a Kentucky General Partnership, ALBERT J. VESPER III; RONALD J. VESPER; PAUL J. VESPER; STEPHEN J. VESPER; DENNIS J. VESPER,
General Partners

and

ALBERT J. VESPER, III, Guardian of the Estate of Alicia Vesper
Appellant-Plaintiffs

vs.

BOONE COUNTY FISCAL COURT; BRUCE FERGUSON; DON DAVIS; IRENE PATRICK; SHIRLEY MEIHAUS; BOONE COUNTY PLANNING COMMISSION; LARRY BARNETT; FRED BURCH; LAWRENCE COLLINS; R. N. GREENE; RECTOR JONES; ROBERT KIRBY; DONALD McMILLAN; BARRY NELTNER; THURMAN OWENS; RALPH RUSH; FLOYD SHARP; CAROL SMITH; WILLIAM VIOX; ERPENBECK COMMERCIAL ENTERPRISES, INC.
Appellee-Defendants

NOTICE OF APPEAL FROM DECISION OF BOONE COUNTY FISCAL COURT AND AMENDED COMPLAINT FOR DECLARATORY JUDGMENT AND MONETARY DAMAGES

* * * * * * * * * * * * *

DEMAND FOR TRIAL BY JURY

* * * * * * * * * * * * *

1. Appellants, Enterprise VI, a Kentucky general partnership, Dennis J. Vesper, managing partner, and Albert J. Vesper III, guardian for the estate of Alicia Vesper, are the owners of real estate located in Boone County, Kentucky, on Route 18, which is fully described in Exhibit "A" attached to the original action.

2. Appellants hereby give Notice of Appeal to the Boone Circuit Court from the final decision of the Boone County Fiscal Court, rendered February 6, 1990, adopting the recommendation of the Boone County Planning Commission denying the utilization of the underlying zone on the property of the Appellants.

3. The Appellants, and each of them, have been injured and aggrieved by the action of the Boone County Fiscal Court and bring this Appeal pursuant to Kentucky Revised Statutes §100.347 as interpreted and applied by the Boone County Fiscal Court through its "Zoning Regulations: Boone County, Kentucky"

adopted December 1986, (herein "Zoning Order") Section 230.

4. Appellants appeal the action of the Boone County Fiscal Court as contrary to law and fact in that:

A. The decision of the Boone County Fiscal Court is contrary to and arbitrary based on the evidence presented; or

B. The decision of the Boone County Fiscal Court was arbitrary in that it was not supported by substantial evidence; or

C. The action of the Boone County Fiscal Court denying Appellant's use of its property causes Appellants to be treated differently than other persons similarly situated and inconsistent with the mandates of K.R.S. §100.203 requiring uniformity of regulations; or

D. The action of the Boone County Fiscal Court in denying Appellants the use of their property bears no reasonable relationship to the public health, safety, morals, or general welfare or Boone County; or

E. The action of the Boone County Fiscal Court in denying the use of the Appellants' property is unreasonable, arbitrary, and confiscatory and is an abuse of its discretion; or

F. The Boone County Fiscal Court's Zoning Order, Article 15, is contrary to, not authorized by and

inconsistent with Chapter 100 of the Kentucky Revised Statute; or

G. The action of the Boone County Fiscal Court in denying the use of the Appellants' property is inconsistent with the "Zoning Order" in that:

(i) The Fiscal Court has applied the Zoning Order, Article 15, regulations to the Appellants' property although no Concept Development Plan has been proposed or adopted for the subject property by the Boone County Fiscal Court as required by Zoning Order, §1502; and/or

(ii) The Boone County Fiscal Court and the Boone County Planning Commission failed to follow the requirements of the Zoning Order, §1506, when it failed to make a finding that the proposed use of Appellants' property did not "deviate from standard district regulations"; and/or

(iii) The Boone County Fiscal Court failed to implement and enforce its Zoning Order when the proposed use of the Appellants' property was authorized under the Zoning Order, including Articles 9 and 10.

5. The action of the Boone County Fiscal Court and its Boone County Planning Commission in denying the use of the Appellants' property was a violation of the Fifth and Fourteenth Amendments to the Constitution of the United States prohibition against depriving "any person

of life, liberty or property without due process of law" and violative of sections 13 and 242 of the Constitution of the Commonwealth of Kentucky.

WHEREFORE, the Boone Circuit Court is asked to review the actions of the Boone County Fiscal Court and render appropriate orders.

/s/ Paul J. Vesper
PAUL J. VESPER
VESPER & ALGIE
1005 Madison Avenue
Covington, KY 41011
(606) 491-4222
Attorney for Appellants
Enterprise VI and
Albert J. Vesper III,
Guardian

AMENDED COMPLAINT FOR DECLARATORY JUDGMENT AND MONETARY DAMAGES

I. Introduction

1. This action is brought pursuant to Kentucky Revised Statute, Chapter 418, and the Rules of Civil Procedure and seeks a declaration of rights of the Plaintiffs under Kentucky Planning and Zoning Statutes, Kentucky Revised Statute 100.111 et seq. and the "Zoning Order: Boone County, Kentucky," adopted December 1986. Additionally, Plaintiffs seek an award of damages from the Boone County

Fiscal Court for inverse condemnation; interference with contractual relations, violations of the United States Constitution, Constitution of Kentucky, federal and state law and in the alternative, against the other Defendants individually.

II. Parties

2. Enterprise VI is a Kentucky general partnership consisting of Albert J. Vesper III, Ronald J. Vesper, Paul J. Vesper, Stephen J. Vesper and Dennis J. Vesper, who serves as managing partner. Albert J. Vesper III is guardian for the estate of Alicia Vesper pursuant to an order of the Kenton District Court, Probate Division (herein individually and collectively referred to as "Vesper"). Vesper has been aggrieved and injured by the actions of the Boone county Fiscal Court and the Boone County Planning Commission.

3. Vesper is the owner of a 264 acre parcel of real estate located in Boone County, Kentucky, on Kentucky 18 at Limaburg, Kentucky. The subject of this litigation is a particular 43.45 acre site which is part of the larger tract and described in Exhibit A attached (herein "Zoned Parcel").

4. The Boone County Fiscal Court (herein "Fiscal Court") is the chief body with legislative power in the county where the Zoned Parcel is located. It has the authority to regulate the zoning

in unincorporated areas of Boone County pursuant to Chapter 100 of the Kentucky Revised Statutes (herein "Zoning Enabling Legislation").

5. The Fiscal Court acts through its county commissioners and the county-judge executive. The members of the Fiscal Court are Bruce Ferguson, as County-Judge Executive, Don Davis, Commissioner, Shirley Meihaus, Commissioner, and Irene Patrick, Commissioner (herein "Fiscal Court Members")

6. The Boone County Planning Commission (herein "Commission") is the planning unit established by the Fiscal Court pursuant to the Zoning Enabling Legislation to perform planning operations for the Fiscal Court and operate as an administrative body of the Fiscal Court in performing those duties. Included within these duties is (i) the making of recommendations to the Fiscal Court under Article 3 of the Zoning Order and (ii) review with recommendation of applications under Article 15 of the Zoning Order.

7. Defendants, Larry Barnett, Fred Burch, Lawrence Collins, R.N. Greene, Rector Jones, Robert Kirby, Donald McMillan, Barry Neltner, Thurman Owens, Ralph Rush, Floyd Sharp, Carol Smith, and William Viox, are members of the Boone County Planning Commission (herein "Commission Members"), who in their

capacity as commissioners have taken part in action described in rejecting the use of the Zoned Parcel, all of which have aggrieved and injured Vesper. William Viox is Chairman of the Commission (herein "Chairman") and has authority and acted in such capacity uniquely in relation to the Zoned Parcel.

8. Erpenbeck Commercial Enterprises, Inc., is a Kentucky corporation (herein "Erpenbeck") who contracted with Vesper to purchase among other property, the Zoned Parcel. Erpenbeck was the applicant before the Fiscal Court and Commission for utilization of the underlying zone on the Zoned Parcel and is a Defendant in this action pursuant to K.R.S. 100.347(4).

FIRST CAUSE OF ACTION
FOR DECLARATORY RELIEF

III. Statement of Case and Controversary

9. In December of 1986, the Fiscal Court adopted the Zoning Order based upon alleged authority granted by the Zoning Enabling Legislation.

10. Pursuant to the Zoning Order, the Fiscal Court adopted a Zoning Map for Boone County which indicated that a Zoned Parcel was zoned a combination of "C-2" Commercial District Two and "I-1" Employment District Industrial One. The section of the Zoned Parcel designated "C-2" was overlaid with "PD" Planned

Development special zoning district as defined by Article 15 of the Zoning Order.

11. The "C-2" District is the type of zoning which permits a variety of retail business and office uses without limit to the market area which is served including but not limited to: department stores, discount stores and major purchase retail centers. The purpose of a "C-2" district is:

> "...to provide comparable shopping goods, personal and professional services, and some convenience goods required for normal living needs as well as major purchase opportunities." (Zoning Order, §920).

Uses in a "C-2" district includes all uses permitted in a "C-1" or "O-1" district. The minimum size of a development in a 'C-2" district is two acres with maximum intensity for development over four (4) acres of 18,000 square feet of gross floor space per acre.

12. The "I-1" Employment District Industrial One is a type of zoning which permits small to medium scale transportation, warehouse, light manufacturing and related services. Uses permitted in the district include but not limited to: whclesale manufacturing, distribution and assemblage of products, and truck terminals. The minimum size of

the development is five acres with the maximum intensity not exceeding 25,000 square feet of gross floor space per acre.

13. Pursuant to the Zoning Order, the placement of a "C-2" district (§920) and "I-1" district (§1030) are located on suitable lands with access to expressways or arterial roads in a regional trade and transportation environment.

14. The "PD" Planned Development is a special overlay zoning district, provided for in the Zoning Order, Article 15, which allows some variety among land uses and densities. Article 15 of the Zoning Order describes the intent of the "PD" district as:

> "...to provide a permissive and alternative zoning procedure...(for)...proposals capable of providing substantial values to the community over the conventional districting and other regulations prescribed as normal course in this order..."(1500)(emphasis added)

A "PD" is an overlay zone which means there is always an underlying zone which serves as a reference point to determine principally permitted uses under the standard zoning classification. A "PD" zoning will allow variance of use, design, intensity, size and other features of a development. A "PD"

district will allow intensity of uses equal to 150% of use permitted in the underlying district.

(A) Zoning with a "PD" Overlay District.

(i) Pursuant to the Zoning Order, a planned development district overlay may be approved by the Commission and Fiscal Court in the manner provided by Article 15 (§1502).

(ii) The procedure for obtaining a "PD" overlay is initiated by the owner of the property to be overlaid with the "PD" designation:

(1) the owner meets with the commission staff, where, among other things, the staff would specify the modifications required of the Concept Development Plan and the applicability of other regulations (§1503);

(2) the owner submits a Concept Development Plan (§1504);

(3) the Commission conducts a public hearing (§1505);

(4) the Commission makes a recommendation on the Concept Development Plan (§1506); and

(5) the Fiscal Court acts on the Commission's recommendation (§1507) by placing the "PD" overlay, on the owner's property.

This procedure is the only procedure described in Article 15 for the

application of a PD to an underlying zone in Boone County.

(B) The Commission's Review of the Concept Development Plan.

In reviewing the Concept Development Plan (step 3 above), the standard that the Commission is required to apply is specified in Zoning Order §1506 as:

> "...it is consistent with the intent and purpose of this order; whether the proposed development...justify the deviation from the standard district regulations."
> (emphasis added)

15. The Zoned Parcel has never been the subject of an approved Concept Development Plan. Accordingly, pursuant to the Zoning Order, the Zoned Parcel was not subject to the regulations of Article 15.

16. By placing the PD overlay on the Zoned Parcel, without owners request, the Fiscal Court allowed no permitted uses on the parcel without further legislative action.

17. A parcel with a PD overlay placed upon it at the initiative of the Fiscal Court, cannot obtain a zone permit under Article 14 of the Zoning Ordinance without legislative action by the Fiscal Court.

18. Vesper, by contract, agreed to sell the Zoned Parcel, along with the

balance of the tract of land, to Erpenbeck.

19. Erpenbeck contracted to sell to Hyper Shoppes, Inc., dba Bigg's (herein "Bigg's"), the Zoned Parcel for the construction of a retail shopping mall to accommodate a Bigg's discount store (herein "Project").

20. Bigg's had the option to withdraw from the purchase should Erpenbeck be unsuccessful in timely obtaining the necessary permits from Boone County for the construction of the Project.

21. Erpenbeck similarly had the option to withdraw from the contract of purchase and sale with Vesper if Erpenbeck was unsuccessful in obtaining the necessary permits from Boone County for the construction of the Project.

22. Erpenbeck, through its officers and agents, met with the staff of the Commission and explained the details of the Project.

23. The purpose of this meeting and other meetings with the staff of the Commission was for the staff to advise Erpenbeck of any manner in which the Project proposal violated requirements of zoning laws so that modifications, if necessary, could be made or considered before the public hearing.

24. Erpenbeck explained that the Project was or could be modified to be wholly consistent with the underlying

zoning on the Zoned Parcel and that to resort to the rezoning or increased densities of the PD overlay (as provided in Article 15 of the Zoning Order) was unnecessary.

25. The staff of the Commission, including the Boone County Zoning Administrator, Jerry Newton, instructed Erpenbeck that no proposal for the Zoned Parcel would be accepted without the filing of a Concept Development Plan as defined by Article 15 of the Zoning Order and K.R.S. §100.111(8).

26. At no time prior to the final decision was Erpenbeck advised of any manner in which the Project violated requirements of the underlying "C-2" or "I-1" zoning or any other zoning regulation.

27. Erpenbeck protested the submission of a Concept Development Plan since the Project was consistent with the underlying zoning on the Zoned Parcel.

28. Based on the Zoning Administrators interpretation of the Zoning Order, Erpenbeck was incorrectly and needlessly required to submit a Concept Development Plan to the Commission and to undergo the procedures of Article 15 of the Zoning Order.

29. In an effort to mitigate damages, on November 1, 1989, Erpenbeck filed an application affecting the Zoned Property for "The Utilization of an Underlying Zone in Planned Development"

with the Commission which clearly disclosed that the uses and intensities of the Project were consistent with the underlying zone and that none of the benefits of a PD Planned Development were requested or required.

30. The Commission scheduled a public hearing for November 29, 1989, on the application at which time the hearing was rescheduled to December 6, 1989, because of the large number of witnesses in attendance.

31. On December 6, 1989, a Public Hearing was conducted by the Commission at the Boone County High School gymnasium where the staff delivered its report and testimony was taken from various witnesses.

32. Although not reflected in the minutes of the Commission meetings, the application of the Erpenbeck's was apparently assigned by the Chairman to a committee for review and recommendation. This committee consisted of Barry Neltner, Fred Burch, Rector Jones, Larry Barnett, Carol Smith and Phil Damstrom (who did not appear to participate).

33. The Committee of the Commission filed its report, dated January 3, 1990, and made no findings regarding the Project and its relationship to the underlying zoning nor did the Committee determine whether the Project was a deviation from the standard district regulations.

34. The Committee, in its report, concluded the Project was evaluated from a "land use standpoint: and volunteered the Erpenbeck proposed end-user of the Zoned Parcel (i.e. Bigg's) could find other locations in Boone County.

35. On January 3, 1990, the Commission without comment adopted the report of the Committee and recommended to the Fiscal Court "that the proposed use not be allowed."

36. The Boone Fiscal Court, at its meeting on February 6, 1990, without comment, adopted the final action of the Commission and refused the use of the Zoned Parcel as described in the Project.

37. Based upon the actions of the Fiscal Court, Bigg's have cancelled the contract with Erpenbeck and Erpenbeck has cancelled the contract with Vesper.

IV. Argument

38. Defendants, Fiscal Court and Commission, and the individual Commission members named herein, in denying the use of the underlying zone on the Zoned Parcel grossly abused its discretion, acted contrary to law, and acted in a manner that bears no reasonable relationship to the public health, safety, morals, or general welfare.

39. The Defendants (other than Erpenbeck) have adopted procedures inconsistent with the Zoning Order and/or applied the Zoning Order in such a manner as to deny Vesper the reasonable and

proper use of the Zoned Parcel. These procedures included but were not limited to:

(a) misapplication of the PD Planned Development Overlay Zone designation; and/or

(b) failure to make findings as required by §1506 of the Zoning Order.

40. Vesper had exhausted all available and reasonable administrative remedies and/or appeals, and any other remedies, if any, would be unduly burdensome on Vesper or unreasonable.

41. The restrictions, limitations and procedures imposed by the Defendants, other than the Erpenbecks, upon the use of the Zoned Parcel through the Zoning Order and its interpretation:

(a) bear no reasonable relationship to the public health, safety, morals, or general welfare, and are in excess of the legislative and regulatory power of the Fiscal Court and the Commission; and

(b) are improper, invalid, and contrary to law as applied; and

(c) are unreasonable, arbitrary, and confiscatory, and, therefore, unconstitutional.

42. The actions of the Fiscal Court in adopting Article 15 of the Zoning Order as interpreted by the Commission and the Fiscal Court in its use of PD Overlay Zoning is contrary to and not authorized by the Zoning Enabling

Legislation and is thereby an abuse of the powers of the Fiscal Court, unreasonable and arbitrary.

43. The action of the Fiscal Court and the Commission and its Commission members in denying the request of the Erpenbecks for use of the Zoned Parcel:

(a) is not supported by substantial evidence, but is clearly erroneous based on reliable, probative, and material evidence in the records; and

(b) was based on matters which were irrelevant, immaterial, nonsupportive, and as such, were insufficient for denial, and thereby constituted arbitrary and capricious action on the part of the offending Defendants.

44. The rights of Vesper are affected and continue to be affected by the Zoning Order as interpreted and applied by the Fiscal Court, Fiscal Court members, Commission, and Commission members in such a manner as to seriously injure and affect the property rights of Vesper, to wit:

(a) Offending Defendants are exercising unconditional and unfettered discretion as to what type of development may occur on the Zoned Parcel; and/or

(b) Offending Defendants are applying and interpreting the various conditions, requirements, and recommendations of the Zoning Order in such a manner to arbitrarily and

capriciously deny requests for development of the Zoned Parcel.

45. The Project submitted to the Commission and Fiscal Court by Erpenbeck was, in fact, wholly consistent with the Zoning Order.

V. Relief Sought

Appellant-Plaintiffs demand:

A.) The Court declare the denial of the use of the Zoned Parcel as proposed in the Project by Erpenbeck and the restrictions and limitations imposed by the Fiscal Court and Commission upon the Zoned Parcel are unreasonable, arbitrary, confiscatory, and not reasonably related to the public health, safety, morals, and general welfare, and therefore, are unconstitutional and invalid;

B.) The Court declare that the placing of the "PD" Planned Development district overlay zoning on the Zoned Parcel was inconsistent with the Zoning Order, and that Article 15 of the Zoning Order has no application to the Zoned Parcel or in the alternative as applied to the Vesper property is unconstitutional and void;

C.) The Court declare that the findings of the Commission and Fiscal Court in denying the use of the Zoned Parcel as requested by the Project filed by Erpenbeck were not in accord with the mandates of the Zoning Order for review of such Project and thus was null and void;

D.) The Court declares that the Fiscal Court and Commission's action in denying the reasonable use of the Zoned Parcel and/or in not authorizing the reasonable use thereof, constituted a gross abuse of discretion and contrary to the law; and

E.) The Court declares that the Project proposed by Erpenbeck is a reasonable and proper use of the Zoned Parcel, and therefore, is permitted;

F.) The Court declare that the actions of the Defendants constitute the causes of action hereinafter set out in the Second through the Sixth Causes of Action; and

G.) The Court awards Plaintiffs the costs of the is Court and this litigation and reasonable attorney fees; and

H.) The Court award Plaintiff all further relief, legal and equitable, to which Plaintiff may be entitled.

SECOND CAUSE OF ACTION SEEKING AN AWARD OF MONETARY DAMAGES AS TO THE BOONE COUNTY FISCAL COURT (INVERSE CONDEMNATION)

46. The Plaintiff repeats and realleges the allegations of the previous paragraphs and incorporates same as if written herein.

47. The acts or actions of the Defendants, and each of them, previously referred to herein (except Erpenbeck)

were the acts taken by agents and employees of the Fiscal Court.

48. All such acts by agents and employees were taken by such agents and employees acting in their official capacities or acting under color of laws and in accordance with official policy, custom and practice of the Fiscal Court.

49. This cause being against the Fiscal Court, the funds and property held in the name of Boone County, Kentucky, or the Fiscal Court will be subject to execution as a result of any award to Vesper in this action.

50. Under this cause of action, Vesper does not seek an award that would result in subjecting to execution the funds or property held in the names of individual Defendants other than Boone County, Kentucky, or its Fiscal Court.

51. The action of the Defendant, Fiscal Court, in denying the use of Plaintiffs' Zoned Parcel was without authority and in violation of the Fifth and Fourteenth Amendment of the United States Constitution and sections 1(5), 2, 3, 13, 14, 59 and 242 of the Constitution of the Commonwealth of Kentucky.

52. As a result of the unauthorized taking of an interest in Plaintiffs' property, a right has accrued to Plaintiff for recovery from the Defendant, Fiscal Court, of just compensation of the interest of the interest taken from the date in which

that taking was affected, February 6, 1990.

THIRD CAUSE OF ACTION SEEKING AN AWARD OF MONETARY DAMAGES AS TO THE BOONE COUNTY FISCAL COURT (STATUTORY VIOLATION)

53. Plaintiff repeats and realleges the allegations of all paragraphs and incorporates same as if written herein.

54. The action of the Defendant, Fiscal Court, in adopting, interpreting and/or enforcing the Zoning Order is inconsistent with the provision of the Zoning Enabling Legislation and Sections 1(5), 2, 3, 13, 14, 59 and 242 of the Kentucky Constitution and has caused Plaintiff to suffer damages for which recovery is provided under K.R.S. 446.070.

FOURTH CAUSE OF ACTION SEEKING AN AWARD OF MONETARY DAMAGES AS TO THE BOONE COUNTY FISCAL COURT (INTERFERENCE WITH CONTRACTUAL RELATIONS)

55. Plaintiff repeats and realleges the allegations of all paragraphs and incorporates same as if written herein.

56. Vesper had agreed to sell the Zoned Parcel and the adjoining tract of land to Erpenbeck and Erpenbeck had agreed to purchase the Zoned Parcel and the adjoining tract of land. This contract was known to the Defendants.

57. As a direct result of the Defendants' refusal to timely allow the use of the Zoned Parcel, Erpenbeck has cancelled the agreement to purchase the Zoned Parcel and the adjoining tract of land.

58. Certain agents of the Fiscal Court have intentionally and improperly engaged in conduct in their official capacity to cause Erpenbeck not to complete this contract. The conduct and acts of the Fiscal Court and its agents were without justification, contrary to legal requirements, and in excess of and an abuse of their authority.

59. As a result, Vesper has lost the benefit of its bargain and Vesper has been damaged in an amount as not yet determined.

FIFTH CAUSE OF ACTION SEEKING AN AWARD OF MONETARY DAMAGES AS TO THE BOONE COUNTY FISCAL COURT (42 U.S.C. §1983 and §1988)

60. Plaintiff repeats and realleges the allegations of all paragraphs and incorporates same as if written herein.

61. The Defendants' action referred to herein (other than Erpenbeck) are in violation of the Fifth and Fourteenth Amendments of the Constitution of the Untied States in that they constitute a taking of Vesper's property without just compensation and deprivation of Vesper's

property without substantive or procedure due process of law.

62. The Defendants taking and deprivation of Vesper's property caused Vesper substantial loss and damage. Included in such loss and damage are the diminution in the value of the property by the taking, even if deemed temporary.

63. Vesper is entitled to recover its loss and damages from the Fiscal Court pursuant to the Fifth and Fourteenth Amendments to the United States Constitution and pursuant to 42 U.S.C. §1983 and §1988, and their reasonable attorney's fees pursuant to 42 U.S.C. §1988.

SIXTH CAUSE OF ACTION IN THE ALTERNATIVE SEEKING AN AWARD OF MONETARY DAMAGES THE FISCAL COURT MEMBERS AND COMMISSION MEMBERS (ACTION IN THE ALTERNATIVE TO FIFTH CAUSE OF ACTION)

64. Plaintiff repeats and realleges the allegations of all paragraphs and incorporates same as if written herein.

65. This cause of action is in the alternative to the Second, Third, Fourth and Fifth Causes of Action and only advanced if the Fiscal Court denies the allegations of paragraphs 47 and 48 above, or offers an affirmative defense discharging the Fiscal Court from liability for the acts of the Fiscal Court Members or Commission members or

other agents of the Fiscal Court which would not be available to such members.

66. The actions of the Fiscal Court Members and/or Commission Members were taken by such Defendants acting in their official capacities and acting under color or law, but said actions were not taken pursuant to official policy, custom or practice of Boone County, Kentucky or its Fiscal Court.

67. The acts or actions of the Fiscal Court Members of Commission Members were taken negligently or willfully in the real or feigned belief that same were in accordance with the official policy, custom or practice of Boone County, Kentucky, or its Fiscal or the Commission.

68. The illegality of the Fiscal Court Members or Commission Members' actions are clearly established and such illegality was known or should have been know to them at the time the actions were taken.

69. The Fiscal Court Members or Commission Members are jointly and severally liable to Vesper on the preceding causes of action.

70. Vesper seeks a judgment which would subject the funds and property held in the name of the Fiscal Court Members or Commission Members to execution.

WHEREFORE, the Plaintiff demands:

A) Judgment for the Plaintiff against Boone County Fiscal Court for the

loss, damage and expense in an amount as not yet determined but in excess of the minimal jurisdiction of this Court.

B) For interest at the lawful rate from the date of loss, damage or expenses until judgment is paid.

C) In the alternative, judgment against the individual Fiscal Court Members and Commission Members under the Sixth Cause of Action in an amount as not yet determined.

D) Recovery of costs and attorney fees and for all other relief to which it is entitled.

E) For trial by jury on the issues presented in this cause of action.

/s/ Paul J. Vesper

PAUL J. VESPER
VESPER & ALGIE
1005 Madison Avenue
Covington, KY 41011
(606) 491-4222
Attorney for Appellant/Plaintiffs

CERTIFICATION

I hereby certify that a true and correct copy of the foregoing Amended Complaint was served upon Dale Wilson, Attorney for Boone County Planning Commission and its Members, 7699 Tanners Lane, Florence, KY 41042; Larry Crigler, Attorney for Boone Bounty Fiscal Court and its Members, 2995 Washington,

Burlington, KY 41005; Thomas R. Nienabor, Attorney for Erpenbeck, P.O. Box 6910, Florence, KY 41042; and to Alex Talbott, 2100 First National Tower, 101 S. Fifth Street, Louisville, KY 40202-3129, on this the 24th day of May, 1991, by ordinary United States Mail, first-class, postage prepaid.

/s/ Paul J. Vesper

FILED
DEC 21 1994
OFFICE OF THE CLERK

No. 94-939

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

ENTERPRISE VI, *et al.*,

Petitioners,

v.

BRUCE FERGUSON, *et al.*,

Respondents.

and

ERPENBECK COMMERCIAL ENTERPRISES, INC., *et al.*,

Petitioners,

v.

BRUCE FERGUSON, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF KENTUCKY

RESPONDENTS' BRIEF IN OPPOSITION

JOSEPH L. BAKER
ZIEGLER & SCHNEIDER, P.S.C.
200 Covington Mutual Building
629 Madison Avenue
Covington, Kentucky 41011
(606) 581-4553
Counsel for Respondents.

December 21, 1994

Washington, D.C. • THIEL PRESS • (202) 328-3286

39 pp

QUESTIONS PRESENTED

I. Whether Petitioners possessed a property interest in their proposed zoning concept development plan sufficient to support a Fifth Amendment taking and a Fourteenth Amendment due process claim as a basis for Petitioners' alleged 42 U.S.C. §1983 claim.

II. Whether members of the Boone County Planning and Zoning Board and the Boone County Fiscal Court act in a quasi-judicial manner in conducting a public hearing on a zoning concept development plan and therefore enjoy absolute judicial immunity.

III. Whether the members of the Boone County Planning and Zoning Board and Boone County Fiscal Court in denying the zoning concept development plan are entitled to qualified immunity as a matter of law.

Page

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATUTORY PROVISIONS INVOLVED 1

COUNTERSTATEMENT OF THE CASE 2

REASONS FOR DENYING PETITION 5

ARGUMENT:

I. Whether Petitioners Possessed A Property Interest In Their Proposed Zoning Concept Development Plan Sufficient To Support A Fifth Amendment Taking And A Fourteenth Amendment Due Process Claim As A Basis For Petitioners' Alleged 42 U.S.C. § 1983 Claim 6

II. Whether Members Of The Boone County Planning And Zoning Board And The Boone County Fiscal Court Act In A Quasi-Judicial Manner In Conducting A Public Hearing On A Zoning Concept Development Plan And, Therefore, Enjoy Absolute Judicial Immunity 9

III. Whether The Members Of The Boone County Planning And Zoning Board And Boone County Fiscal Court In Denying The Zoning Concept Development Plan Are Entitled To Qualified Immunity As A Matter Of Law 14

CONCLUSION 16

APPENDIX A – Order Denying Discretionary Review 1a

APPENDIX B – Boone County Zoning Ordinances 2a

TABLE OF AUTHORITIES

Page

Cases:

B Street Commons v. Board of County Comm'rs, 835 F.Supp. 1266 (D. Colo. 1993) 16

Bass v. Attardi, 868 F.2d 45 (3rd Cir. 1989) 9, 10, 14

Baytree of Inverrary Realty, Inc. v. City of Lauderhill, 873 F.2d 1407 (11th Cir. 1989) 10

Bellemeade Company v. Priddle, 503 S.W.2d 734 (Ky. 1974) 16

Board of Regents v. Roth, 408 U.S. 564 (1972) 6

Burns v. Reed, 500 U.S. 478 (1991) 13

Butz v. Economou, 438 U.S. 478 (1978) 5, 9, 14, 17

Carroll v. City of Prattville, 653 F.Supp. 933 (M.D. Ala. 1987) 10

Centennial Land and Development Co. v. Township of Medford, 165 N.J. Superior 220, 397 A.2d 1136 (1979) 11

City of Beechwood Village v. Council, etc., 574 S.W.2d 322 (Ky. App. 1978) 12

City of Louisville v. McDonald, 470 S.W.2d 173 (Ky. 1971) 12

Cloverdale v. Department of Social and Health Services, 834 F.2d 758 (9th Cir. 1987) 9

Dunmore v. City of Natchez, 703 F.Supp. 31 (S.D. Miss. 1988) 10

Fiscal Court of Jefferson Cty. v. Ogden, 556 S.W.2d 899 (Ky. App. 1977) 12

Hacker v. Baesler, 812 S.W.2d 706 (Ky. 1991) 12

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 14, 15

Hope Baptist Church v. City of Bellefontaine Neighbors, 655 F.Supp. 1216 (E.D. Mo. 1987) 10

Horwitz v. State Board of Medical Examiners, 822 F.2d 1508 (10th Cir. 1987) 9, 14

Cases, continued: Page

Jodeco, Inc. v. Hahn, 674 F.Supp. 488 (D.N.J. 1987) 9, 10, 11, 12, 14

Kawaoka v. City of Arroyo Grande, 17 F.3d 1227 (9th Cir. 1994) 7

Kutilek v. Gannon, 766 F.Supp. 967 (D. Kan. 1991) 10, 14

Lake County Estates, Inc v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979) 10

McKinstry v. Wells, 548 S.W.2d 169 (Ky. 1977) 12

Mitchell v. Forsyth, 472 U.S. 511 (1985) 15

Qualls v. Parrish, 534 F.2d 690 (6th Cir. 1976) 9

Resource Development Corp. v. Campbell County Fiscal Court, 543 S.W.2d 225 (Ky. 1976) 12

Siegert v. Gilley, 500 U.S. 226 (1991) 6

Silver v. Franklin Township Board of Zoning Appeals et al., 966 F.2d 1031 (6th Cir. 1992) 7

Vacas v. Rodriguez, 728 F.2d 1293 (10th Cir. 1984) 10

Statutes:

42 U.S.C. §1983 . . . . . 2, 5, 6, 8, 16

Kentucky Revised Statutes 100.213 12

Ordinance:

Boone County Zoning Ordinance, Chapter 15, §1500 7

§1504 7

§1506 8

No. 94-939

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

ENTERPRISE VI, *et al.*,

Petitioners,

v.

BRUCE FERGUSON, *et al.*,

Respondents.

and

ERPENBECK COMMERCIAL ENTERPRISES, INC., *et al.*,

Petitioners,

v.

BRUCE FERGUSON, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF KENTUCKY

RESPONDENTS' BRIEF IN OPPOSITION

STATUTORY PROVISIONS INVOLVED

42 U.S.C. §1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or

> Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured and in an action at law, suit in equity, or other proper proceeding for redress.

Article 15, the pertinent provision of the Boone County Zoning Ordinance, appears in the Appendix.

COUNTERSTATEMENT OF THE CASE

This is an action brought pursuant to 42 U.S.C. §1983 against the individual members of the Boone County Planning Commission and the Boone County Fiscal Court, being Bruce Ferguson, Don Davis, Irene Patrick, Shirley Meihaus, Larry Barnett, Fred Burch, Lawrence Collins, R. N. Greene, Rector Jones, Robert Kirby, Donald McMillan, Barry Neltner, Thurman Owens, Ralph Rush, Floyd Sharp, Carol Smith, and William Viox. (Petitioners' App. 18a). Petitioners appeal the dismissal of the individual Respondents. (Petitioners' App. 5a).

The Petitioners own 264 acres of undeveloped property in Boone County, Kentucky, along State Route 18 near the Florence Mall. (Petitioners' App. 23a). In 1986, the Boone County zoning authorities designated this tract a combination of C-2/PD overlay and I-1. (Petitioners' App. 25a). The C-2 zone permits commercial uses. (Petitioners' App. 26a). The I-1 zone permits industrial uses. (Petitioners' App. 26a). The PD overlay designation to the C-2 zone requires a submission of a concept development plan and approval by the Boone County Planning Commission and the Boone County

Fiscal Court. (Petitioners' App. 28a). In considering the concept plan, the Commission is to evaluate its compatibility with the County Comprehensive Plan (the County's chief planning document), deviations from the underlying zone, the density and effect on surrounding properties and roadways, among other factors. (Petitioners' App. 28a).

In late 1989, Petitioners and others filed an application with the Boone County Planning Commission proposing the construction of a Bigg's hypermarket on 43.45 acres of this property. (Petitioners' App. 30a). Of the 43.45 acres, 34.8 lay in the CC-2/PD overlay zone with the balance in the I-1 zone. (Petitioners' App. 6a). The Bigg's hypermarket would be a permitted use in a straight C-2 zone but not the adjoining I-1 industrial zone. (Petitioners' App. 6a). Petitioners refused to file a zone change application for the acreage zoned I-1.

The proposal proved exceedingly controversial and drew much public comment. (Petitioners' App. 32a). The initial Planning Commission hearing required rescheduling to a large high school auditorium to accommodate the crowd. (Petitioners' App. 32a). The Planning Commission voted to recommend denial of the submitted concept development plan to the Boone County Fiscal Court. (Petitioners' App. 15a).

Since the property lay in unincorporated Boone County, the Fiscal Court is the legislative body with final authority under K.R.S. Chapter 100. (Petitioners' App. 23a-24a). The Fiscal Court eventually approved the recommendation of the Planning Commission and denied the concept development plan in February, 1990. (Petitioners' App. 33a).

Petitioners submitted no further plan to the Commission, but immediately instituted this action in the Boone Circuit Court appealing the decision of the Boone County Fiscal Court. (Petitioners' App. 7a). Some seventeen months later however, in July, 1991, the Petitioners amended their complaint in the Boone Circuit Court to add the individual members of the Boone County Planning Commission and the individual members of the Boone County Fiscal Court as defendants under 42 U.S.C. §1983. (Petitioners' App. 22a-44a).

Prior to filing an answer, these individual Respondents filed a motion to dismiss for failure to state a claim pursuant to Kentucky Civil Rule of Procedure 12.02. (Petitioners' App. 16a). The Boone Circuit Court dismissed them by its Order entered October 28, 1991. (Petitioners' App. 14a). As detailed later in this brief, the Court's Order contained several bases for dismissal but most prominently among them is the Court's holding that the individual Respondents herein were entitled to absolute immunity from the §1983 claim posed by Petitioners. (Petitioners' App. 15a). On December 19, 1991, the Boone Circuit Court overruled Petitioners' motion to vacate its prior judgment. (Petitioners' App. 17a). Petitioners unsuccessfully appealed to the Kentucky Court of Appeals which affirmed the dismissal in an unpublished opinion. (Petitioners' App. 4a). The Kentucky Supreme Court denied discretionary review by Order entered August 24, 1994. (Petitioners' App. 1a).

On December 14, 1994, the Kentucky Supreme Court denied discretionary review of the underlying companion zoning appeal from the Boone Circuit Court's summary judgment in favor of the Boone County Planning Commission and the Boone County Fiscal Court and against the Petitioners. (App., *Infra,* 1a).

REASONS FOR DENYING PETITION

Petitioners have failed to establish a violation of any constitutional right at all. Petitioners have no legitimate claim of entitlement or justifiable expectation in the approval of their concept development plan. State law invests both the Boone County Planning Commission and the Fiscal Court with great discretion in approving, denying or modifying proposed development plans. Thus, Petitioners lack a property interest requisite to an action pursuant to 42 U.S.C. §1983.

If the Court posits a liberty or property interest sufficient to undergird an action based on 42 U.S.C. §1983, the individual members of the Planning Commission and Fiscal Court should be granted absolute immunity since they function in a quasi-judicial role. *Butz v. Economou*, 438 U.S. 478 (1978). Kentucky's Supreme Court has characterized this process as "essentially adjudicatory".

Finally, at a minimum, the individual members of the Boone County Planning Commission and Boone County Fiscal Court are entitled to qualified immunity since Petitioners have failed to plead a violation of a constitutional right that was clearly established at the time of these individual Commissioners' action.

ARGUMENT

I.

WHETHER PETITIONERS POSSESSED A PROPERTY INTEREST IN THEIR PROPOSED ZONING CONCEPT DEVELOPMENT PLAN SUFFICIENT TO SUPPORT A FIFTH AMENDMENT TAKING AND A FOURTEENTH AMENDMENT DUE PROCESS CLAIM AS A BASIS FOR PETITIONERS' ALLEGED 42 U.S.C. §1983 CLAIM.

Petitioners characterize this case as one presenting to the Supreme Court the opportunity to consider whether absolute judicial immunity is available to local planners and zoners. However, Petitioners fail to cross the initial threshold requirement to an action brought under 42 U.S.C. §1983. Petitioners have failed to establish the violation of any constitutional right at all.

In *Siegert v. Gilley,* 500 U.S. 226 (1991), this Court set forth the analytical structure for claims of immunity. The Court noted on page 231 of its opinion that the first inquiry in the examination of such an immunity claim is the allegation of the violation of a clearly established constitutional right. Respondents claim that Petitioners have not only failed to establish a violation of a clearly established constitutional right, but that Petitioners have failed to establish the violation of any constitutional right at all.

Respondents argue that Petitioners have no "legitimate claim of entitlement" or "justifiable expectation" in the approval of their concept development plan, sufficient to raise to a property interest. *Board of Regents v. Roth,* 408 U.S. 564 (1972). The lack of a property interest flows from the broad discretion invested in the Planning Commission and Fiscal Court by law. In order to establish a property interest, Petitioners must demonstrate that the Planning Commission and Fiscal Court lacked

discretion to deny the concept development plan if it met certain minimum mandatory requirements. *Silver v. Franklin Township Board of Zoning Appeals, et al.*, 966 F.2d 1031 (6th Cir. 1992). Furthermore, as discussed below the Planning Commission's denial of the concept development plan does not lack a rational basis. *Kawaoka v. City of Arroyo Grande*, 17 F.3d 1227 (9th Cir. 1994).

Section 1504 of the applicable zoning regulations requires review and approval of a concept development plan for development of any property with a PD overlay designation. In 1986, the Boone County Comprehensive Plan identified the area in which the Petitioners' property was located, i.e., the Kentucky 18 corridor, as needing protection from regionally oriented commercial development generating high volumes of traffic. The overlay zone assures that the commercial development will be of a lesser scale than the regional kind and that the commercial development will be coordinated with either existing infrastructure or infrastructure will be provided as part of the new development.

Section 1506 sets forth the standards for review of a concept development plan. The Planning Commission reviews the concept development plan for:

(1) consistency with the intent and purpose of §1500;

(2) whether the proposed development advances the general welfare of the community and neighborhood; and

(3) whether the benefits, combination of various land uses, innovation of physical design, and the inter-relationship with the land uses in the surrounding area justify the deviation from standard district regulations.

Section 1500 sets forth various criteria which include, among others:

(1) a useful pattern of open space;

(2) a development pattern preserving and utilizing natural topography trees and vegetation;

(3) efficient use of land; and

(4) a development pattern in harmony with land use density, transportation facilities, community facilities, and objectives of the comprehensive plan.

Thus both the Boone County Planning Commission and the Fiscal Court are invested with wide discretion in accepting or rejecting or requiring modifications to any proposed concept development plan. Furthermore, the criteria used to judge the plan is rationally related to the planning and zoning purposes of the public police power. Therefore, Petitioners have no entitlement to the approval of any specific concept development plan.

Petitioners thus trip at the threshold of their §1983 claim. Petitioners have simply failed to establish a violation of a constitutional right at all. The Planning Commission acted completely within its discretion in denying the concept development plan. Petitioners made no effort to amend the plan or otherwise satisfy concerns of the Commission. Rather, Petitioners rushed immediately to court in bringing the instant action. For these reasons, the case presents no real opportunity for the Supreme Court to review immunity, whether qualified or absolute. Lacking a constitutional violation, Petitioners' case, on its facts, does not even reach the immunity issue.

II.

WHETHER MEMBERS OF THE BOONE COUNTY PLANNING AND ZONING BOARD AND THE BOONE COUNTY FISCAL COURT ACT IN A QUASI-JUDICIAL MANNER IN CONDUCTING A PUBLIC HEARING ON A ZONING CONCEPT DEVELOPMENT PLAN AND, THEREFORE, ENJOY ABSOLUTE JUDICIAL IMMUNITY.

"It is well settled that federal, not state law, determines the adequacy of defenses asserted in civil rights actions brought pursuant to 42 U.S.C. §1983." *Jodeco, Inc. v. Hahn,* 674 F.Supp. 488, 497 (D.N.J. 1987). However, a court may consider relevant state law in determining which federal immunity standard appropriately applies to the facts of the case. *Qualls v. Parrish,* 534 F.2d 690, 694 (6th Cir. 1976). The United States Supreme Court has extended the absolute immunity available to judges to all persons who function as a judge, explicitly including administrative hearing officers. *Butz v. Economou,* 438 U.S. 478 (1978). Since the *Butz* decision, federal courts have extended absolute immunity to a variety of persons who function in a judicial or quasi-judicial nature. *Bass v. Attardi,* 868 F.2d 45 (3rd Cir. 1989) [absolute immunity granted to members of a city planning board for their allegedly unconstitutional refusal to grant site plan approval and a parking variance for a methadone maintenance treatment center] ; *Horwitz v. State Board of Medical Examiners,* 822 F.2d 1508 (10th Cir. 1987) [members of the Colorado State Board of Medical Examiners in their individual capacities were granted absolute immunity when sued by a plaintiff podiatrist for suspending his license in alleged violation of due process] ; *Cloverdale v. Department of Social and Health Services,* 834 F.2d 758 (9th Cir. 1987) [absolute immunity granted to state employed child protective services workers for her actions in seeking,

obtaining and executing an ex parte court order directing that plaintiff's newborn daughter be seized from the hospital and placed in temporary shelter care]; *Vacas v. Rodriguez,* 728 F.2d 1293 (10th Cir. 1984) [members of state board of healing arts accused of violating procedural due process]; *Kutilek v. Gannon,* 766 F.Supp. 967 (D.Kan. 1991) [absolute immunity granted to executive director of board and physician consultants to state board of healing arts].

In the zoning context, absolute immunity is the rule rather than the exception. Numerous cases have held members of various planning and zoning boards absolutely immune as either protected by absolute legislative immunity or absolutely judicial or quasi-judicial immunity. *Jodeco, Inc. v. Hahn,* 674 F.Supp. 488 (D.N.J. 1987); *Baytree of Inverrary Realty, Inc. v. City of Lauderhill,* 873 F.2d 1407 (11th Cir. 1989); *Bass v. Attardi,* 868 F.2d 45 (3rd Cir. 1989); *Dunmore v. City of Natchez,* 703 F.Supp. 31 (S.D. Miss. 1988); *Hope Baptist Church v. City of Bellefontaine Neighbors,* 655 F.Supp. 1216 (E.D.Mo. 1987); *Carroll v. City of Prattville,* 653 F.Supp. 933 (M.D.Ala. 1987).

The *Jodeco* case was specifically relied upon by the Boone Circuit Court in its order of dismissal and offers the best discussion and review of this area of the law. The Court first noted that zoning officials sometimes act in a legislative function and, as such, are entitled to absolute immunity under *Lake County Estates, Inc. v. Tahoe Regional Planning Agency,* 440 U.S. 391 (1979). At times, zoning officials act as adjudicators. The Court analyzed the reasons underlying the grant of immunity to judges, concluding that the immunity:

> benefits the public interest by insuring judicial independence and by preventing judges from being subjected to vexatious actions. If a civil action could be maintained against a judge by virtue of an allegation of malice or even negligence, judges would lose that independence without which no judiciary can either be respectful or useful.

Jodeco, Inc. v. Hahn, 674 F.Supp. 488, 496-497 (D.N.J. 1987) (citations omitted.)

The Court next found this same rationale equally applicable to the New Jersey Planning and Zoning Board in question. The New Jersey Planning and Zoning Board was required to hold a hearing on each application for a development adoption or revision or amendments of its master plan. The hearing was conducted with due process safeguards, including the fact that the agency was required to act upon written findings of fact and conclusions based thereon, which were subject to reivew on an arbitrary and capricious standard. The court concluded that the planning and zoning boards "shared enough of the characteristics of the judicial process to warrant an absolute privilege, their respective members operated in a quasi-judicial capacity and were therefore properly immune from suit." *Id.* at 498. In quoting *Centennial Land and Development Co. v. Township of Medford,* 165 N.J. Superior 220, 397 A.2d 1136 (1979), the court noted:

> Many of these local zoning official serve voluntarily, often at night, without remunerations; have to expend extensive time and effort in preparing and participating in the land use development of the community. Were this court to hold that these board members were without any immunity, the inevitable consequence would be to deter intelligent civic-minded persons from serving on munic-

> ipal land use boards. The fear of incurring great expense and attorney's fees, losing time from employment and suffering the anxiety and distress resulting therefrom, could have no other effect.

Jodeco, Inc., 674 F.Supp. at 498.

An examination of Kentucky law indicates that members of the Planning and Zoning Commission and Fiscal Court in ruling on zoning matters such as involved in this case act in an adjudicatory fashion. Therefore, the same quasi-judicial absolute immunity protects their actions from vexatious lawsuits such as this. Both by case law and statute, the Planning Commission and Fiscal Court are required to hold a public hearing on zone change applications. K.R.S. 100.213; *City of Beechwood Village v. Council, etc.*, 574 S.W.2d 322 (Ky. App. 1978). At the hearing, applicants are entitled to present evidence and cross examine witnesses. *Fiscal Court of Jefferson Cty. v. Ogden*, 556 S.W.2d 899 (Ky. App. 1977). Furthermore, the public entity must act on the basis of a record, *Resource Development Corp. v. Campbell County Fiscal Court*, 543 S.W.2d 225 (Ky. 1976), and adopt written findings of fact and conclusions. *McKinstry v. Wells*, 548 S.W.2d 169 (Ky. 1977). The findings and conclusions are subject to review on an arbitrary and capricious standard. *City of Louisville v. McDonald*, 470 S.W.2d 173 (Ky. 1971). These public officials obviously function in an adjudicatory manner. Most recently, the Kentucky Supreme Court has explicitly held such in the case of *Hacker v. Baesler*, 812 S.W.2d 706 (Ky. 1991). At page 709-710 of its opinion, the Kentucky Supreme Court held:

> While the zoning classification which an individual property owner should enjoy is not a justiciable issue, an ordinance effecting an amendment to

> reclassify a particular property is nonetheless a culmination of a process essentially adjudicatory. K.R.S. 100.211 creates (or perhaps merely confirms) the right of a property owner to propose an amendment. Any amendment must be consistent with the comprehensive zoning plan, unless the plan is found to be inapplicable to the situation presented. The interests of an identifiable, individual property owner are weighed against the statutory criteria, and, often, against the interests of identifiable opponents of the amendment. The determination turns upon facts specific to one discreet property. Such fact finding, although hybrid, is inherently more adjudicative than legislative, and the result must be supported by substantial evidence.

Such reasoning directly characterizes the activities of the Boone County Planning Commission and Fiscal Court. Procedurally, the approval process for the concept development plan is identical to a zone change request. The same public hearing and procedural safeguards apply. The Commission acts as adjudicators on the basis of a record. As such, judicial immunity appropriately protects these Commissioners from the same vexations and fosters the same public interests as with the judiciary proper. In fact, recourse to the court under Kentucky law is by appeal from the record of the Planning Commission and not *de novo.* The Planning Commission functions as the trial level compiler of the fixed factual record upon which all subsequent procedural steps depend in an appellate process.

Petitioners misconstrue the holding of *Burns v. Reed,* 500 U.S. 478 (1991). *Burns* does not concern judicial immunity, but prosecutorial immunity. In *Burns,* the Supreme Court reaffirmed its earlier holdings that prose-

cutors are absolutely immune for activities related to the judicial process. However, such immunity does not attach to prosecutors involved in activities only remotely connected to the judicial process. In that case, the Supreme Court refused to extend absolute immunity to a prosecutor for giving advice to police since police officers had only qualified immunity for following the advice. In short, the giving of legal advice was not deemed intimately related to the judicial process. The same can hardly be said of those who are acting as judge in adjudicatory hearings. Absolute judicial immunity should apply to these persons. *Butz v. Economou,* 438 U.S. 478 (1978); *Bass v. Attardi,* 868 F.2d 45 (3rd Cir. 1989); *Horwitz v. State Board of Medical Examiners,* 822 F.2d 1508 (10th Cir. 1987); *Kutilek v. Gannon,* 766 F.Supp. 967 (D.Kan. 1991); *Jodeco, Inc. v. Hahn,* 674 F.Supp. 488 (D.N.J. 1987).

III.

WHETHER THE MEMBERS OF THE BOONE COUNTY PLANNING AND ZONING BOARD AND BOONE COUNTY FISCAL COURT IN DENYING THE ZONING CONCEPT DEVELOPMENT PLAN ARE ENTITLED TO QUALIFIED IMMUNITY AS A MATTER OF LAW.

Even if absolute immunity were not available to the individual Respondents herein, their dismissal would still be appropriate under qualified immunity. Since the trial court granted the individuals' motion to dismiss, no answer raising this defense or the statute of limitations appears in the record. However, both defenses bar the Petitioners' actions.

In the case of *Harlow v. Fitzgerald,* 457 U.S. 800 (1982), the Supreme Court abandoned the subjective state of mind of the public official in favor of an objective test. The express purposes of the test were to protect

public officials from both the expense and the energy needed to defend vexatious lawsuits such as this one. The issue of immunity was given to the Court to be determined prior to discovery. The Court held:

> We conclude today that bare allegations of malice should not suffice to subject government officials either to the cost of trial or the burdens of broad-reaching discovery. We therefore hold that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.
>
> Reliance on the objective reasonableness of an official's conduct, as measured by reference to clearly established law, should avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment. On summary judgment, the judge appropriately may determine, not only the currently applicable law, but whether that law was clearly established at the time an action occurred. If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful. Until this threshold immunity question is resolved, discovery should not be allowed.

Id., at 818.

The Court has emphasized the importance of the qualified immunity test by holding that denials of qualified immunity are immediately appealable. *Mitchell v. Forsyth*, 472 U.S. 511 (1985). As *Mitchell* makes clear, the Court's determination of whether the official's con-

duct violated clearly established "statutory or constitutional rights" should come prior to the conducting of discovery.

The individual Respondents in this case, at a minimum, enjoy a qualified immunity and therefore properly were dismissed from the lawsuit. Their conduct consists of conducting a due process public hearing regarding a concept development plan and enforcing existing Boone County zoning ordinances which provide for a "floating zone". Kentucky courts have seemingly approved the floating zone concept. *Bellemeade Company v. Priddle,* 503 S.W.2d 734 (Ky. 1974). Even if such zones should subsequently be held unconstitutional, qualified immunity shields these Respondents, since at the time these individual Respondents voted to reject Petitioners' concept development plan under such zoning regulations, their conduct did not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *B Street Commons v. Board of County Comm'rs,* 835 F.Supp. 1266 (D.Colo. 1993). Without question, therefore, these Respondents are entitled to at least qualified immunity and were properly dismissed by the Boone Circuit Court.

CONCLUSION

The Petition for Certiorari should be denied. Petitioners fail to satisfy the initial threshold question of establishing a violation of a constitutional right such as is necessary to support their action based upon 42 U.S.C. §1983. Petitioners had no legitimate claim of entitlement or justifiable expectation to the approval of their concept development plan. Lacking such, the question of immunities, whether absolute or qualified, does not arise. If the Court reaches the immunities question,

clearly these Commissioners function in a quasi-judicial function under Kentucky state law and are thus entitled to absolute judicial immunity under *Butz v. Economou*, 438 U.S. 478 (1978). At a minimum, these Commissioners are entitled to qualified immunity for Petitioners' failure to articulate a violation of their constitutional rights which were clearly established at the time of the action.

Respectfully submitted,

JOSEPH L. BAKER
ZIEGLER & SCHNEIDER, P.S.C.
200 Covington Mutual Building
629 Madison Avenue
Covington, Kentucky 41011
(606) 581-4553
Counsel for Respondents.

APPENDIX A

SUPREME COURT OF KENTUCKY
94-SC-769-D & 94-SC-778-D
(92-CA-3110-MR & 93-CA-262-MR)

ENTERPRISE VI, A KENTUCKY GENERAL PARTNERSHIP, ET AL. *MOVANTS*

vs. Boone Circuit Court
No. 90-CI-174

BOONE COUNTY FISCAL COURT, ET AL.
RESPONDENTS

AND

ERPENBECK COMMERCIAL ENTERPRISES, INC. *MOVANT*

vs. Boone Circuit Court
No. 90-CI-175

BOONE COUNTY FISCAL COURT, ET AL.
RESPONDENTS

ORDER DENYING DISCRETIONARY REVIEW

The motions for review of the decision of the Court of Appeals are denied.

ENTERED December 14, 1994.

/s/ Robert F. Stephens
Chief Justice

APPENDIX B

BOONE COUNTY ZONING ORDINANCES

ARTICLE 15
PLANNED DEVELOPMENT (PD)

Section 1500

Intent

The intent of this article is to provide a permissive and alternative zoning procedure for innovative, mixed use residential, commercial, industrial or other type developments or physical design proposals capable of proving substantial value to the community over the conventional districting and other regulations prescribed as normal course in this order but requiring unique consideration, disposition, control and approval. Planned Development (PD) is a special overlay zoning district, which allows some variety among land uses and densities in return for imaginative designs.

Since Planned Development is an overlay zone, there is always an underlying zone which serves as a reference point to determine principally permitted accessory and conditional uses under the standard zoning classifications. However, if certain uses, which are not normally permitted in the underlying zone, are compatible, the Planned Development zone may be flexible to allow these uses. Also, the physical boundaries of the underlying zones within a Planned Development are intended to be flexible and not restrictive.

The intensity of use in a Planned Development zone may exceed by no more than fifty (50) percent the maximum intensity permitted in the underlying zoning district. If building intensity increased in Planned Development,

then the amount of open space (e.g., existing vegetation, buffer areas and new landscape) should increase proportionately.

A planned development may vary the height, use, organization, design, intensity, size or other features of the proposed development. In the case that a specific corridor study has been adopted for an area, intensity and open space recommendations of that study shall apply to specific development sites within the study area.

The planned development zone is intended to encourage:

- A maximum choice of living environments by allowing a variety of housing and building types and permitting a reduction in lot dimensions, yards, building setbacks, and area requirements;
- A more useful pattern of open space and recreation areas and, if permitted as part of the project, more convenience in the location of accessory commercial uses and services;
- A development pattern which preserves and utilizes natural topography and geologic features, scenic vistas, trees and other vegetation, and prevents the disruption of natural drainage patterns.
- A more efficient use of land than is generally achieved through conventional development resulting in substantial savings through shorter utilities and streets;
- A development pattern in harmony with land use density, transportation facilities, community facilities, and objectives of the comprehensive plan;
- A signage package in harmony with the objectives of the Planned Development.

Section 1501

Provisions Governing Planned Unit Developments

Because of the special characteristics of planned developments, special provisions governing the development of land for this purpose are required. Whenever there is a conflict or difference between the provisions of this article and those of other articles of this order, the provisions of this article shall prevail. Subjects not covered by this article shall be governed by the respective provisions found elsewhere in this order.

Section 1502

Application and Procedure

Upon approval by the Planning Commission and the legislative body or Fiscal Court, a planned development district may be applied to any other existing district in this order. Upon approval of a concept development plan, the Official Zoning Map shall be annotated for the land area involved so that the district name includes the notation, "PD." Planned development districts shall be approved by the Planning Commission and the legislative body or Fiscal Court in the manner provided in this Article.

For development plans on sites within the Houston-Donaldson Study Area, the recommended Implementation procedure in that study shall be followed. This may result in a development not following the normal Planned Development process if those development plans are consistent with the recommendations of the 'Houston-Donaldson Study'. This shall be determined through a Technical Committee recommendation to the full Planning Commission at the next regular Business Meeting. Decision as to the review process to be followed shall be by simple majority vote.

Section 1503

Pre-Application Meeting

The developer shall meet with an appropriate staff person of the Planning Commission prior to the submission of a concept development plan. The purpose of the meeting will be to discuss early and informally the purpose and effect of this order and the criteria and standards which may apply, and to familiarize the developer with the detailed objectives of the comprehensive plan and its elements, this order and this article.

For development plans within the Houston-Donaldson Study Area, a pre-application meeting of the applicant with the Technical Committee of the Planning Commission shall also be held. The purpose of this meeting is to arrive at a recommendation to the full Planning Commission as to whether or not the developer's plans are consistent with the recommendations of the 'Houston-Donaldson Study'. The Technical Committee meeting may be held immediately prior to a Business Meeting, and recommendation of the committee may be verbal.

Section 1504

Submittal and Contents of Application for Approval of Concept Development Plan

The Planning Commission shall require that a Concept Development Plan be submitted for property located in a Planned Development zone. The Concept Development Plan may be filed to the Planning Commission by the owner(s), owner by contract (option) or lessee of property for which the planned development is proposed. The Concept Development Plan shall include the following minimum requirements. The list of other requirements are *optional only.* With certain type of develop-

ments, it may be beneficial to submit a Concept Development Plan that is more detailed or provides more information to the Planning Commission. The list of other requirements are highly recommended for these types of developments and to provide further support for approval of a Concept Development Plan by the Planning Commission. In the case that a specific corridor study is in effect for a site, the optional requirements of a Concept Development Plan are especially important. Any special areas of concern in such a study must also be addressed by the Concept Development Plan. For sites within the Houston-Donaldson Study Area, Design Review and Signage information is required as part of the developer's plan information.

Minimum Requirements

1. *General Site Characteristics* – ownership, geography, soils, drainage, vegetation and other physical characteristics.
2. *Transportation Patterns* – public and private roads and internal and external circulation patterns.
3. *Land Use Characteristics* – existing and proposed land uses, structures and buildings (general description of size, area and height).
4. *Utilities and Infrastructure*
5. *Relationship of Proposed Zone Change or Submitted Concept Development Plan with Comprehensive Plan* – how specifically the proposed zone change or Submitted Concept Development Plan would conflict, conform, complement or otherwise affect the Comprehensive Plan.

OPTIONAL REQUIREMENTS OF CONCEPT DEVELOPMENT PLAN

1. Include Items 1-5 in the previously mentioned list of minimum requirements.
2. An area map showing adjacent property owners and existing land uses within 200 feet of the parcel.
3. If the site has unusual or unique natural features, demonstrate how proposed development preserves and utilizes natural topography and geologic features, scenic vistas, trees and other vegetation, and prevents the disruption of natural drainage patterns. If necessary, geotechnical studies should be submitted to indicate soil types, depth of bedrock and slope stability.
4. The location, description and size (acreage) of land uses.
5. Approximate location and number of residential units (if any) along with approximate square footage, density and height.
6. Approximate location and size (square footage) of non-residential buildings.
7. The location of public and private roads, rights-of-way, easements and parking.
8. Calculation of amount of open space both before and after construction. Indicate areas of expected open space and new landscaping. Include maintenance plans for these areas.
9. Where portions of the site are subject to flooding, the Concept Development Plan shall indicate extent and frequency.

10. General location of water, sanitary sewer, telephone, electrical and storm water lines. Capacity levels are recommended.
11. General description of the availability of community facilities such as schools, fire protection services and other types of facilities if any, and how these facilities are affected by this proposal.
12. Preliminary assessment of excavation and fill requirements along with storm water retention and detention plans.
13. Indicate the staging or construction schedule of the project.
14. Submit a detailed traffic study if the proposed development is large-scaled or if the project would significantly alter existing traffic patterns or volume.
15. Submit a sketch or drawing of the proposed buildings to demonstrate the visual appearance or a type of architecture. The Planning Commission and legislative body or Fiscal Court may recommend or approve the proposed district subject to any conditions or qualifications found merited in the Concept Development Plan or other conditions on the site. The Commission's approval in principle of the Concept Development Plan shall constitute a commitment to the planned land use types and intensities. Approval in principle shall not be construed to endorse a precise location or mixture of uses, configuration of parcels, arrangement of physical design, engineering feasibility or other particulars. The Planning Commission may seek assistance in making its recommendation from any appropriate source.

Section 1505

Public Hearing by Planning Commission

Upon receipt of an application for approval of a concept development plan, the Planning Commission shall hold at least one public hearing, within thirty (30) days of receipt of the application, after notice as required for amendment under Kentucky Revised Statutes, Chapter 424. The following notice, in addition to any other notice required by statute or local regulation or order, shall be given:

1. Notice of the hearing shall be posted conspicuously on the property for which the planned development is proposed at least fourteen (14) days in advance of the hearing; and

2. Notice of the hearing shall be given at least fourteen (14) days in advance of the hearing by registered mail or by certified mail, return receipt requested, to owners of all property adjoining the property for which the planned development is proposed. It shall be the duty of the person or persons proposing the amendment to furnish the names and addresses of the owners of all adjoining property. Records maintained by the Property Valuation Administrator may be relied upon conclusively to determine the identity and address of property owners.

3. Notice of the hearing shall be published in a newspaper of general circulation at least once, but may be published two (2) or more times, provided that one (1) publication occurs not less than seven (7) days prior to the hearing. Said published notice shall state, at a minimum, the time, place and purpose of the hearing.

Section 1506

Approval in Principle by Planning Commission

Within thirty (30) days after the public hearing required by Section 1505, the Planning Commission shall review the concept development plan to determine if it is consistent with the intent and purpose of this order; whether the proposed development advances the general welfare of the community and neighborhood, and whether the benefits, combination of various land uses, innovation of physical design, and the inter-relationship with the land uses in the surrounding area justify the deviation from standard district regulations. The Commission's approval in principle of the Concept Development Plan shall be necessary before a Preliminary Development Plan may be approved. Approval in principle shall constitute a commitment to the planned land use types and intensities. Approval in principle shall not be construed to endorse a precise location or mixture of uses, configuration of parcels, arrangement of physical design, engineering feasibility of other particulars. The Planning Commission may seek assistance in making its recommendation from any appropriate source.

Section 1507

Action by Legislative Body or Fiscal Court

After approval of the Concept Development Plan by the Planning Commission, all papers constituting the record and recommendations of the Planning Commission shall be transmitted to the Legislative Body or Fiscal Court. Within ninety (90) days after receipt of said materials, the Legislative Body or Fiscal Court shall, by ordinance or order, approve or disapprove the Concept Development Plan Application. Approval of the Concept Devel-

opment Plan Application shall constitute an amendment to the Zoning Map and the subject parcel shall be labeled with the designation (PD) after the underlying zone designation. A Certificate of Land Use Restriction shall be filed within 30 days of final action as explained in Section 290. If disapproved, the Legislative Body or Fiscal Court shall state the reasons for disapproval.

Section 1508

Preliminary Development Plan

After approval of the Concept Development Plan by the Legislative Body or Fiscal Court, or determination by the Planning Commission that the developer's plans are consistent with a specific study that impacts the development site, the developer shall submit a preliminary development plan to the Planning Commission. The preliminary development plan may cover the entire site shown in the concept development plan or a section of said site. The preliminary development plan shall be in general conformance with the concept development plan approved in principle. Five (5) copies of the preliminary development plan shall be submitted and must be endorsed by a Professional Engineer, Architect, or Landscape Architect registered in the Commonwealth of Kentucky.

Section 1509

Contents of Application for Approval of Preliminary Development Plan

An application for approval of the preliminary development plan shall be filed with the Chairperson of the Planning Commission by at least one (1) owner, owner by contract (option), or lessee of property for which the

planned development is proposed. Each application shall be signed by the owner or lessee, attesting to the truth and exactness of all information supplied on the application for preliminary development plan. Each application shall clearly state that the approval shall expire and may be revoked if construction on the project has not begun within three (3) years from the date of issuance of the approval. The application shall contain the following information:

1. A survey of the proposed development site, showing the dimensions and bearings of the property lines, structures and improvements, area in acres, topography, and other existing features of the development site bearing on the plan including major wooded areas, structures, streets, easements, utility lines, land uses, and the like;
2. All the information required on the Concept Development Plan: the location and sizes of lots, location and proposed density of dwelling units, non-residential building intensity, and land use considered suitable for adjacent properties;
3. A schedule for the development of units to be constructed in progression and a description of the design principles for buildings and streetscapes; tabulation of the number of housing units proposed by type; estimated residential population by type of housing; estimated non-residential population; and standards for height, open space, building density, parking areas, population density and public improvements proposed for each section of the development whenever the applicant proposes an exception from standard zoning districts or other orders governing development;
4. Engineering studies and plans showing, as necessary, water, sewer, drainage, electricity, telephone, and nat-

ural gas installations; waste disposal facilities; street improvements, and nature and extent of earthwork required for site preparation and development;

5. A site plan, showing multi-family or nonresidential building(s) or single family residential lots, various functional use areas, circulation, and their relationship;

6. Conceptual or typical landscaping facade, paving, street furniture and other plans and designs;

7. A description of deed restrictions, protective covenants, and other legal statements or devices to be used to control the use, development and maintenance of the land, and the improvements thereon, including those areas which are to be commonly owned and maintained.

The approval of the preliminary development plan shall constitute and substitute for the approval of a preliminary subdivision plat as required by the Boone County Subdivision Regulations. The engineering and other information required for the preliminary development plan shall generally be submitted at the same level of accuracy and detail as is required in the Preliminary Subdivision Plat.

Improvement plans and final plats shall be submitted in accordance with the standards and procedures required in the Boone County Subdivision Regulations, or, where no subdivision of land is required in accordance with Article 14, Site Plan Review, of this order.

Section 1510

Decision by Planning Commission

Within sixty (60) days after receipt of the preliminary development plan, the Planning Commission shall approve as presented, approve with supplementary conditions, or disapprove the preliminary development plan, stating the reasons for its actions in writing.

Section 1511

Expiration and Extension of Approval Period

The approval of a Preliminary Development Plan for a planned development district shall be for a period not to exceed two (2) years to allow for preparation and recording of the required subdivision plat the development of the project. If no construction has begun within three (3) years after approval is granted, the approved preliminary development plan may be voided and the land may revert to the district regulations in which it is located when the process for Amendment in Article 3 is followed.

No zoning amendment passed during the time period granted for the approved preliminary development plan shall in any way affect the terms under which approval of the planned unit development was granted. A one (1) year extension of an approved Preliminary Development Plan may be granted upon request to the Planning Commission.

Section 1514

Permitted Uses

Any uses found to be compatible and of value to the community under the proposal may be combined in

planned development districts provided that the proposed location of the uses will not adversely affect adjacent property, and/or the public health, safety, and general welfare and/or the specific objectives of the comprehensive plan.

It is also provided that the amount of land devoted to each use in a planned development shall be specifically determined by the Planning Commission.

Section 1515

Intensity

The intensity of use in a planned development may exceed by no more than fifty (50) percent the maximum intensity permitted in the underlying zone district.

Section 1516

Minimum Size

The minimum size or area required for a planned development overlay shall be no less than five (5) acres.

Section 1517

Minimum Standards

A planned development and its permitted, accessory and conditional uses, buildings or structures shall be subject to the supplemental, parking and loading, signage regulations of this order, unless superceded by any special requirements, conditions, variances or other particulars imposed by the Planning Commission during the concept or preliminary application and hearing phases described in this article. Such special conditions may include provisions governing project ownership, common open space, lands or facilities, disposition of open land, infrastructure

provisions including any physical design and/or any other requirement found to be necessary, appropriate or desirable for the purposes of this district.

Such conditions shall be made a part of the terms under which the development is approved. Any violation of such conditions shall be deemed a violation of this order.

Section 1518

Amendments to Concept Development Plan and Preliminary Development Plan

Amendments to the Concept Development Plan involving changes in the development concept, uses, intensity or other elements must be submitted to the Planning Commission and shall conform to the procedure described in Sections 1505-1507. Changes to the Preliminary Development Plan must be submitted to the Director for his approval. The Director shall make a determination that the proposed change does not affect the overall development concept in terms of use, intensity and design, before approving a change. A denial of a proposed change to the preliminary development plan by the Director may be appealed by the applicant to the Planning Commission. The Director may refer any proposed change to the preliminary development plan to the Planning Commission for their decision.